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**Occidental Legality, Imagined Geographies, and Law
Implications for Recognition, Diversity and Minorities in Liberal Societies**

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**“Occidental Legality, Imagined Geographies, and Law: Implications for
Recognition, Diversity and Minorities in Liberal Societies”**

Sabrina Gilani

Doctor of Philosophy in Law

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Abstract

This thesis discusses how imagined geographies are made real through structures of political and legal governance. Using a method of historical literary analysis, this thesis analyses how geographic space was imagined by European voyagers, explorers, and political agents during the first encounters between European and non-European people in the mid-fifteenth century. It traces how this – owned, bounded, culturally-divisible – notion of geographic space was later operationalised through political and legal structures of governance in the colonial and postcolonial setting. I use the term Occidental Legality to refer to these spatialising tendencies and demonstrate how they produce a vision of space that we now associate with ‘territory’. This thesis reveals how an owned, bounded, and culturally-divisible notion of space emerges time and again through contemporary cultural geographies, in particular the Aboriginal Reservation, the ‘protected areas’ of national parks, and the public/private divide. Over the course of this work I trace how geographies are the product of jurisdictional struggles between normative communities, and demonstrate how colonial geographies continue to have an influence on how we manage cultural pluralism today. In so doing, I draw a connection between the exclusionary history of the colonial experience and contemporary forms of minority protection.

By drawing attention to the mutually-constitutive relationship between law and geography, I argue that a focus on territorial forms of autonomy tends to displace the issue that is at the heart of minority demands for cultural and legal recognition. This is the demand for coeval recognition. This thesis concludes by developing the notion of coeval recognition and introducing crucial modifications that need to be made to liberal law and forms of governance if contemporary societies are to ensure better protection for their minority communities. Coeval recognition must be pursued through an acknowledgement of hybridity, a focus on sustaining conditions for self-reflexive intercultural dialogue, and more robust policies to reduce limitations on the mobility of minority communities.

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Conclusion

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Introduction

The Spatial Tendencies of the Colonial Gaze

Occidental Legality and the Territorialisation of Geographic Space

If myth and fantasy touch on levels outside the conscious mind, then simply to point out the falsity of one's imagination leaves untouched the psychic investments which determine the formation of the fiction that sustains the world we live and act within. To recognise the instability of the divide between fantasy and reality, fiction and facts is to begin the difficult and painful task of constructing alternative futures.¹

1. Occidental Legality and the Production of Territory

The greatest measure of a social group's political power is predominantly perceived in terms of its territory - the space in which it exercises its autonomous decision-making capacity. Territory is traditionally imagined as a demarcated geographic zone within which a particular group is said to have exclusive governing capacity. By determining the features and qualities of those that are included within, excluded from, and contained by a space (and the relationships and resources that it contains) groups are able to operationalise their governing power.² Conceptually, therefore, territory is partially understood as a political and legal construct that is underwritten by specific rules of access and diversity, and designed to keep some people out and others within.

As a concept, territory materialised during the colonial period and was the product of European attempts to lay claim to newly discovered land. The concept arose through the mapping of political and jurisdictional boundaries upon conquered lands as a way of claiming *possession*, and gave the impression of sovereign and complete political rule even in those instances in which "an empire's spaces were politically fragmented; legally differentiated; and encased in irregular, porous, and sometimes undefined borders."³ As Benton writes, while "empires did lay claim to vast stretches of territory," imperial power was "exercised mainly over narrow bands, or corridors, and over enclaves and irregular zones around them."⁴ In some way, then, territory not only contained and differentiated the power of one social group from another (one colonising

¹ Gail Ching-Liang Low, *White Skins/Black Masks: Representation and Colonialism* (London: Routledge, 2004), p 2.

² Robert D. Sack, "Human Territoriality: A Theory," *Annals of the Association of American Geographers* 73, no. 1 (1983): p 21-7.

³ Laura Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (New York: Cambridge University Press, 2010), p 2.

⁴ Ibid.

power versus another; or the colonising power versus the colonised peoples), but actually seemed to *materialise* this power by locating it in space and encasing it within boundaries.

But territory is more than simply borders and enclosures backed by legal and political power. It is an *imaginary* as well. Underlying the political and legal possibilities that territory makes possible lies a historical lineage of social thought and literary practice that cuts across centuries of European contact with non-European peoples and ideas. Territory is a social construction that relies on European ways of imagining social difference and exercising cultural domination; territory is a way of classifying, dividing, and, in many ways, *judging* our social world and the relationships that take place within it. And it is this feature of territory, that is, the use of territory analytic for imagining, and putting into force perceptions of inferiority and exclusion, that this thesis is concerned with further analysing.

Territory starts of as 'space'; a space that, through social praxis, rule-making, and narrativising is conceived as bounded, possessed, and culturally-divisible. The processes through which this occurs are subtle in their operation; the realities that they give rise to, are cultivated over centuries of, sometimes imprecise and unintentional, ways of thinking and behaving. Since territory is the culmination of a multitude of micro-level processes and behaviours that take place over a long period of time, its political nature (by which I mean the ways in which it categorises and excludes) become less visible to us. Over the course of this thesis I argue that territory is a cultural artefact, produced through the colonial encounters. It was constructed through narratives and literary representations that were inspired by how colonising agents viewed the lands they 'discovered' and the peoples they conquered. My aim is to demonstrate how these cultural representations of territory underlie, even *inspire*, the legal and political ramifications that territory has for contemporary social relations in liberal societies.

Accordingly, the thesis traces a relationship between the historical construction of territory out of conquered lands, and the contemporary models of territory as it structures State-minority relations today. As a political and legal concept, territory is widely understood as a representation of a political community's possession or claim to land, typically under the doctrine of discovery. In this way, territory is naturalised, as the political and legal product of a linear and benign process of European travel, discovery, possession, and ultimately sovereignty.⁵ However, my aim is to

⁵ Benton, for one, challenges this linear conceptualisation of the relationship between territory and sovereignty in *A Search for Sovereignty*. In this book she argues that, during the colonial period, territorial and sovereign claims often failed to align with one another. Empires frequently lay claims to land over which they were able to exercise very little sovereign jurisdiction. She suggests that this idea that territory represents the limits of absolute and unencumbered governing power is a misconception, and to this end she discusses how colonisation was marked by legal plurality; several groups exercising jurisdictional authority within the same parcel of land. Her work, therefore, challenges the dominant view that the exercise of political and legal power *requires* territory. In reality, the notion of sovereignty, as

demonstrate how ‘territory’ is a particular vision and ordering of space and its contents. Territory was made through the exclusion, differentiation, and dehumanisation of Others who presented an equal (and often greater) moral claim to conquered lands. And this was justified through the linking of spatial possession to ideas about the right to exclusive political and legal control in land and, ultimately, over people. In this thesis I discuss how this occurred, and demonstrate how the legal doctrines and principles developed through these encounters continue to have significant implications for the contemporary processes of reconciliation and recognition in divided societies.

This thesis argues that the notion of territory undermines the pluralistic endeavours of modern liberal societies, and their aims to build more diverse, equal, and inclusive political and legal institutions. One particularly significant way in which territory has traditionally operated to manage social difference is by serving as an optic through which the self and the Other are imagined as being separated in time and space. For example, in Chapter Two and Three I discuss how the legal justification of territorial possession is based on the doctrine of *terra nullius*, a space emptied of its normative content. The native or indigenous Other is extracted from space by being placed ‘back in time’ and understood as being unable to utilise and develop his land to the standards appropriate for possession. Territory was therefore a method by which native communities were dispossessed and colonising forces were empowered to make decisions about how to use and allocate the land that they ‘discovered’. In Chapters Three and Four I study how territorial strategies – the conception of space as bounded, owned, and culturally divisible – continue to operate as mechanisms of native disempowerment within the contemporary world. I submit that territorial strategies materialise through struggles for power between distinct normative communities.

However, since territory is, at least partially, a cultural artefact it represents a *particular* vision of space and ordering of people, but most certainly not the *only* vision of space and ordering of people. In Chapter Three I draw attention to non-European, specifically Aboriginal conceptions of land and geography, and analyse how Aboriginal peoples’ understanding of their relationship to land, conflicts with the dominant Euro-Western conception of territory. This proves problematic given that territorial possession, occupation, use of, development in, and protection of land, serves as the basis of Aboriginal peoples’ claims for recognition of their right to self-government

exclusive jurisdiction over a delimited area of land, is an illusion that has been constructed for the purposes of justifying imperial power and the dispossession of indigenous peoples. *See, Ibid.* Her views have been further supported by MacMillan, who argues that rule through systems of legal pluralism was not only characteristic of the Imperial-Indigenous counters, but were quite common within England and Europe more broadly. He believes that the systems of legal plurality ‘at home’ helped to pattern similar modes of regulation within England’s colonies. *See, Ken MacMillan, Sovereignty and Possession in the English World: The Legal Foundation of Empire, 1576-1640* (Cambridge: CUP, 2006), p 18-19.

and cultural autonomy. Territory is the primary analytic through which demands for cultural recognition are mediated. And yet, it is an analytic that has been developed through a history of native and Aboriginal marginalisation and dehumanisation. Contemporary Aboriginal rights litigation also suggests (and which I discuss at length in Chapter Three) that the analytic of territory *cannot* and often *does not* produce forms of recognition that are favourable to the aspirations of Aboriginal peoples because they have a different relationship to land than is possible to convey through the modern notions of ownership or property law. Despite this significant defect, territory has become integral to Aboriginal claims to self-government because possession and title to land is perceived as a precondition to the exercise of exclusive jurisdiction. Territory and sovereignty have become fused within the political arena.

However, Benton has argued that this idea that territorial claims represent the existence of sovereign jurisdictional authority is a fallacy, and that territory operates to give the illusion of legal/jurisdictional singularity when, in fact, the societies living within any given territory are regulated and protected by multiple legal and political institutions that are consistently interacting with one another and delimiting each others' capacity to control.⁶ Though Benton's analysis is limited to the colonial encounters between the fifteenth and twentieth century, I extend her conclusions to the contemporary period and use them to analyse how contemporary legal geographies – such as the Aboriginal Reservation, the Tribal Areas of Pakistan, and the imaginary public/private divides of the law are themselves classified as cultural spaces created for the purposes of minority exercises of normative autonomy. Yet, I reveal these spaces as sites of *legal excess*, characterised by a range of intersecting and interpenetrating legalities that operate to regulate minority communities in ways that are not immediately visible to us.

Building on these ideas, this thesis argues that contemporary quests for cultural or minority recognition are not *entirely* about the accumulation of territory, but about the power and rights that territory apportions. Native or indigenous struggles for recognition are demands that the State recognise their inherent right of self-rule and sovereign governing potential. The conventional understanding is that the exercise of sovereignty cannot exist independently of territorial autonomy. However, in demonstrating that this relationship between territorial autonomy and exclusive self-government has been overly exaggerated, I open the conversation up to how native self-government can be actualised *without* territory, by which I mean independently of demonstrating their connection to land in a way that fits the 'bounded, owned, culturally-divisible' notion of space that emerged through the colonial encounters.

⁶ So my discussion of Benton's work in FN 5.

Ultimately I argue that liberal societies can better respect demands for cultural autonomy by recognising the native peoples as coeval partners in the making and exercise of a *joint* sovereignty. My idea of coeval recognition shifts attention away from the current fixation with territorial conceptions of space which force native or indigenous peoples to define their rights of self-government by pointing to an unchanging, pre-contact, relationship to the land they occupy and wish to exercise their rights of self-rule upon. Drawing on pre-existing theories of recognition I highlight how my conception of *coeval recognition* is unique because of its focus on the convergence between native-settler identities and interpenetration between their normative practices and institutions. In the first four chapters I demonstrate the various ways in which territory has been produced through anxieties about the merging of native-settler relations and the intermingling of previously distinct normative systems. In the last chapter of this thesis I explain how the recognition of hybridity, identities and political and legal processes *in-between*, is precisely what can move legal recognition from being a unilateral and effectively empty promise, to a more robust and pluralistic conceptual framework for acknowledging minority rights of self-rule and cultural autonomy.

2. Chapter Outline

This thesis can be sub-divided into two parts. In the first part, comprising of Chapter One, Two, and Three, I develop three main ideas. First is the idea that space is political. I draw on the social science literature in the areas of human, social, and legal geography to map the ways in which space has been socially constructed and how our social space is a composite of different interests. Spaces are created in order to make possible certain forms of behaviour and types of relationships while impeding others. Second, I argue that through the Imperial-Indigenous⁷ encounters, beginning from the mid-fifteenth century, a very particular conceptualisation and organisation of political relationships and cultural interaction emerges. According to these emergent views, geographic space is naturally bounded, owned, and culturally divisible. This view of how our land and environment is organised has significantly influenced social and political relations from the time of the first encounters between European and non-European people in the fifteenth century. I analyse a number of different European cultural narratives to analyse why

⁷ I use the term 'Imperial-Indigenous' encounter rather than 'colonial' because the latter has negative connotations and power-related attachments that I think unfairly characterise the early encounters between European and non-European peoples. I do, however, use the term 'colonial' when I speak of the periods in which we witness the implementation of European political and legal structures of governance. This is because I find colonial to be an appropriate term at this point, given the aims of European administrators (that of establishing European models of law and governance in these areas). However, during the early periods of the Imperial expansion these aims were largely absent, and much of the ways in which native communities were settled, managed, and conversed with demonstrates a degree of political 'laxity' when compared to later periods. See, L.A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (London: Cambridge University Press, 2002).

geography and cultural identity have become so fused in the way that we understand the organisation of our social and political world. I argue that the geographies produced during the colonial period radiate European discomfort with the possibility of European and native bodies coming into closer contact with one another. This discomfort manifests itself in pestilential, corrupted, and diseased interpretations of foreign topographies, climates, and environments. These observations often extend to classifying the environments' occupants as culturally inferior and politically under-developed. The effect of juxtaposing these moral judgments alongside observations about nature is that the former is *naturalised*. We are given the impression that these commentaries represent an objective reflection of what is actually being witnessed; these colonial geographies, or colonial orderings of people in space, appear *apolitical*.

In the third chapter, I advance the idea that the geographies produced through the colonial encounter acquire greater authority by being continuously reproduced through political arrangements and forms of legal regulation. The idea that space is naturally bounded, owned, and culturally divisible becomes further pronounced as these cultural geographies are attached with greater legal and political ramifications. 'Territory' is the term I use to describe geographies that have rules mapped onto them. These rules control other peoples' access to space and define the level of diversity that exists within a given space. As such, there appears to be a mutually-constitutive relationship between law and geography. This relationship is revealed most acutely during instances of jurisdictional dispute, and the spatialisation of power struggles between different normative communities vying for greater control over one another. These disputes, as much of Chapter Three clearly elucidates, are based on the belief that divided geographies can offer normative communities some sort of protection from external intervention. In so doing, the normative plurality of space is neutralised and the geographies that are produced (in the form of territory), appear to us as being culturally-distinct and normatively consistent.

Accordingly, the first three chapters of this thesis collectively reproduce a social and political narrative of territory, and they do so by analysing techniques of Imperial witnessing⁸ that emerged through the Imperial-Indigenous encounters. I analyse two important techniques through which European experiences of non-European places and peoples were produced and disseminated: cartography and ethnography (in the form of travel-journals and letter-writing). In particular, I examine the ways in which space is structured, represented, misrepresented, and distorted through these various narratives. Imperial maps, letter-writing, and travel journals reveal a culturally and racially inferior image of non-European. However, when grounded in

⁸ I use the term 'witnessing' to refer to how foreign people and landscapes are observed, imagined, and narrated by European voyagers and political agents.

landscape, climate, and topography, native personalities and practices appear to us as natural observations, as if they are simple and objective documentations of what is 'out there'. I use the term 'Occidental Legality' to describe these spatialising processes. The view of space that is produced through Occidental Legality has the effect of linking geography to identity and geographic difference to cultural difference, emptying space of its social content, and temporalising geographies of difference. I refer to these consequences as the effects of territoriality. The aim of Chapter Two is to demonstrate how the origins of territory are deeply embedded in European cultural practice aimed at exercising control over never-before-encountered peoples and lands. Therefore, territory, from this perspective is *imagined* as being as being natural, or as simply *lying there*, awaiting European arrival and possession. It is a *cultural space*, in the sense that it is produced through perceptions of cultural difference and feelings of European racial and cultural superiority.

Chapter Three demonstrates how law and legal discourse has the effect of normalising an owned, possessed, and culturally-divisible representation of geographic space. This, I argue, is the emergence of 'territory' as we understand it today. Using my analysis of colonial and postcolonial law and governance, I trace how the effects of territoriality can be identified in many of the imagined geographies that emerge through the legal and political discourse of contemporary societies, as they attempt to manage issues of social (and legal) pluralism. Territorial readings of space, I argue, reproduce the inferiority of native identities and cultures. This process perpetuates visions of space and social ordering similar to those that emerged through the Imperial-Indigenous encounters, and the European attempt to temper and regulate alterity. I further go on to make the case that this bounded and owned conception of space stands in stark contrast to non-dominant, Aboriginal perspectives of space and geography. I trace how jurisdictional challenges between Aboriginal and European communities produce varying cultural geographies using the land and environment that they jointly occupy.

What does the construction, and continued persistence, of space as 'territory' reveal about contemporary processes of protecting social diversity? First, I argue that the continued persistence of a territorial vision of space reveals that contemporary liberal democratic societies, though structured through the discourses of liberal multiculturalism, social inclusion, and respect and recognition for cultural diversity, continue to be as preoccupied with identifying, classifying, and containing social difference as the first overseas voyagers who arrived on European ocean fleets to set foot in foreign places. Second, I suggest that a territorial vision of space has very little to do with the recognition of autonomy and diversity, and is better understood as a process for preserving and recreating the referential distance of the first encounters between the self and

those perceived as Others. Moreover, this way of defining space has the further effect of marginalising non-dominant indigenous conceptions of space and geography, and produces modes of governance that remain inconsistent with the demands and desires of indigenous groups. The resulting practices and processes continue to place normative systems along a linear trajectory, creating hierarchical forms of governance that not only diminish the social and legal plurality characterising these societies, but entirely minimize the interactions and interrelationships between them.

I discuss law's implication in reproducing and circulating a bounded, owned, and culturally divisible view of geographic space by reference to several political and legal geographies that operate on a territorial model of space (including the Reservation, the public/private divide, and the protected-areas of national parks). This complex relationship between law and territory calls into question whether liberal law can act as a vehicle for native emancipation. Chapters Two and Three suggest that we should focus more closely on the legal categories of culture and identity, specifically in the context of managing social and legal pluralism, to uncover how a territorial ordering of space may not always be an empowering discourse, but can actually work to further differentiate, subjugate, and distance perceived Others. Liberal law, in this instance, is revealed as a mechanism for further perpetuating the domination and subordination of native communities in the contemporary period.

As stated earlier, the last section of Chapter Three considers Aboriginal perspectives on land and territory in order to demonstrate how liberal law misrepresents Aboriginal claims for recognition of their sovereignty as if they were claims for territorial autonomy. I argue that a territorial categorisation of their struggle fundamentally alters their claims and forecloses opportunity for dialogue between the Canadian State and its Aboriginal communities. By referring to Aboriginal perspectives on the significance of land, space, and territory I draw out precisely why the notion of territory – space that is bounded, owned, and culturally divisible – needs to be unpacked and rethought. It is important to note that I do not argue in favour of deterritorialisation *per se*. Indeed land, and the resources that it provides, are essential components of the exercise of self-determination and a community's right to define the cultural, political, and economic trajectory of social life. Instead I suggest that the notion of territory be widened to include non Euro-Western relationships with, and to the land so that the self-government aspirations of native communities can be better realised.

This brings us to the second half of the thesis, which works towards developing an approach for how contemporary societies can counteract the divisive and subjugating tendencies of Occidental Legality and its production of territory. I begin this section with a case study of the Tribal Areas

of Pakistan. This case study was selected for two reasons. First, it is the perfect example of how cultural spaces are socially constructed and how landscapes and topography play an important role in developing Other-identities. In essence, geography *naturalises* processes of dehumanisation by giving the appearance that it is the natural environment, rather than its people, that is shaping the identities on which discriminatory forms of regulation are being based. The case-study, as such, bridges the ideas expressed in Chapters Two and Three and its analysis clearly reveals both the cultural and political and legal dimensions of territory.

While the first two chapters appear to be critical of liberal law, given that many of its doctrines and principles can be sourced to the Imperial-Indigenous encounters and the dispossession and oppression of native peoples, I still believe that liberal law has the potential to be emancipatory. And this is the second reason why I elected to discuss the Tribal Areas of Pakistan. Since the Pakhtun people living within the Tribal Areas have been granted (what appears to be) absolute normative autonomy, these areas can be characterised as bearing an *absence of liberal law*. Yet, despite the fact that the Tribal Areas exemplify the conventional relationship between territory and sovereign jurisdiction, one would be hard-pressed to argue that Pakistan's recognition of Pakhtun cultural autonomy has improved the day-to-day lived realities of the people that call this region of Pakistan 'home'. Is the absence of liberal law, therefore, the answer we should be seeking in protecting normative diversity?

Altman has suggested that the recognition of normative pluralism never entirely protects against the encroachment of liberal law.⁹ Similarly, Griffith has argued that since recognition of native culture and juridical autonomy must emanate from the State, such recognition already adopts the 'ideology of centralism'.¹⁰ Others have noted that the recognition of juridical autonomy is never absolute, and is almost always followed up by persistent intrusions of liberal law to determine the exact contours of the relationship between 'official law' and 'custom'.¹¹ Pakistan, by its decision to not extend its law or legal institutions to its Tribal Areas, may possibly represent the closest that any government has come to excluding liberal law from native (in this case, tribal) space.

And yet, in Pakistan, this has failed to produce more inclusive forms of governance for those living in the tribal areas. Instead, this right of autonomy has had the consequences of limiting the

⁹ For example, the rule of law principle effectively ensures that the State does not remain neutral in relation to other existing normative systems. See, Andrew Altman, *Critical Legal Studies: A Liberal Critique* (New Jersey: Princeton University Press, 1993).

¹⁰ John Griffiths, "What Is Legal Pluralism?," *Legal Pluralism & Unofficial Law* 24(1986).

¹¹ This is an argument that Kukathas makes, but claims that a more appropriate theory of diversity would compel liberal law to accept the possibility of normative plurality (in forms that liberal law may very well find offensive). See, Chandran Kukathas, "Cultural Toleration," in *Ethnicity and Group Rights*, ed. Ian Shapiro and Will Kymlicka (New York: New York University Press, 1997).

Pakhtun community's enjoyment of their citizenship rights. Moreover, it is doubtful whether this is the type of pluralism which liberal societies are genuinely seeking – a compartmentalisation of numerous normative orders that are limited in their interactions with one another. The conditions within the Tribal Areas, therefore, strengthen my conviction that cultural recognition does not require the allocation of separate and divided territories within which to exercise sovereign governing potential. It does not necessitate the rejection of liberal law. What cultural recognition requires is that States affirm the political and legal parity of indigenous institutions and political ideologies, and allow them the possibility to employ those institutions and ideologies in negotiating more inclusive and just systems of governance.

In concluding Chapter Four I discuss the possibility of a deterritorialised conception of culture, by which I mean a move away from attempting to locate and fix culture and cultural communities in place, space, and geography. While access to land has been a fundamental component of minority demands for self-government, my earlier analysis of Aboriginal literature reveals that these demands may have been misunderstood as appeals for exclusive jurisdiction and the unencumbered control over areas of the State's territory. Instead, as the concluding sections of Chapter Three clearly demonstrates, what Aboriginal communities' desire is not exclusive jurisdiction, but the opportunity to negotiate the use of land and the exercise of their relationship with the environment in ways that correspond with their own distinct normative institutions and worldviews. Yet, to be clear, these are not ways of being and knowing that are entirely insulated from the European liberal perspective that predominates in these societies. Rather, they are hybridised normative systems that assume aspects of Aboriginal tradition, but also draw heavily on European political ideology and legal principles. As such, liberal law's focus on basing Aboriginal rights on the presence of some pure, pre-contact, culture is not only unfair, but unrealistic. Consequently, what I argue is needed is the recognition of this hybridity, and a genuine fostering of equal participation and negotiation between the State and native communities seeking autonomy, recognition, and accommodation. One way in which this interaction can be better organised is by building our legal and political institutions with alternative of space and geography visions in mind. This, I submit would go some ways towards finally deterritorialising culture and accepting the possibility of intercultural interaction and dialogue.

Chapter Five sets out some initial ideas about how liberal law can counteract the effects of Occidental Legality by encouraging potential prospects for change and a respect for the complexities and dynamicity of human interaction, identity, and history. This concluding chapter is founded upon the view that Occidental Legality conceals or displaces what lies at the root of all

demands for cultural autonomy and political recognition, which is the idea of coeval recognition. I further develop the idea of coeval recognition which, on my terms, represents an acknowledgement of the dominant and minority groups' active co-existence in space and time. I argue that Occidental Legality, with its preoccupation with situating, locating, and limiting social groups to discrete, discontinuous, and divided spaces gives the impression of a compartmentalised world in which semi-autonomous social groups co-exist but never intersect. This first impression, however, needs to be re-evaluated and I go on to argue that this re-evaluation needs to be sensitive to the realities of the postcolonial world-order, characterised by conditions of hybridity, institutional overlap, and legal and political inter-exchanges between communities that have historically been defined in incommensurable terms.

I draw on the pre-existing conceptions of recognition to advance my design of coeval recognition. In particular I make use of recent debates in the area of pluralistic constitutionalism¹² and the incorporation of native and Aboriginal law into national legal systems,¹³ and provide some preliminary ideas about what a framework of minority protection framed through coeval recognition may look like. I develop this schema by, one again, referencing Aboriginal legal literature about the meaning and value of space and land to Aboriginal cultural practice and identity.¹⁴ In the process, I demonstrate how a modified conception of territory can continue to be a useful concept for the organisation of political and legal autonomy, but only as a *supplement* to the more deeper forms of communication and dialogue that need to take place between perceived-to-be different normative orders.

3. Methodological Considerations

In arguing that territory has important legal and political consequences for native communities, I draw on Foucault's notion of discursive power to suggest that power is the product of an ability to produce, perpetuate and circulate a particular *representation* of reality as reality itself (a 'truth'). The exercise of discursive power is underwritten by institutional structures (i.e. government, courts, the hospital), pre-existing bodies of knowledge (i.e. comprehensive doctrines, legal statutes, medical knowledge), and other less formal forms of social interaction (i.e. literary

¹² J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge Univ Pr, 1995).

¹³ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2007).

¹⁴ While I often refer to these views as the 'Aboriginal perspective' I want to make clear, from the outset, that I am aware that 'Aboriginality' is *not* a monolithic concept. There is as much differentiation between Aboriginal communities, even in a territory as limited as Canada, as there is between, European communities. I employ such terms only for the sake of simplicity (in the same way that I refer to 'European perspectives'). My analysis, however, attempts to uncover and draw attention to the perspectives of a number of different Aboriginal bands in making its more generalized statements.

sources), which collectively work to authenticate subjective experiences as objective facts. Thus, power is said to be dispersed in social and political networks and relations.¹⁵

A. The Concept of 'Territory'

Over the course of this thesis I demonstrate how territory is constructed – through social interactions, through a process of one's imagination, and through the mapping of political and legal rules. Consequently, the analysis which I undertake through this thesis disrupts the enduring perception that territory is a natural and prepolitical background upon which social interactions take place. Furthermore, many of the claims advanced through this work also problematise the view that territory is both neutral and inclusive. People do not simply find themselves in territory; they are made to be in them. And, for this reason, I argue that territory represents an exercise of power that helps to, on the one hand, contain and define some, and on the other exclude certain other groups of people. Territory is, therefore, a method of classification.

A bounded, owned, culturally-divisible construction of space emerges first within our imagination. We see the natural landscape and topography as giving rise to certain types of people and explaining certain forms of behaviour. At a most rudimentary level, untrammelled and undeveloped land appears to us as a symbol of inactivity. This is perhaps best showcased by the awe we express at the 'pristine wilderness' of national parklands. We understand groups that occupy these spaces as traditional, embodying cultures that continue to 'live in the past'. Conversely, land that has been cultivated, developed, built upon, is viewed as land that is being appropriately exploited and fully utilised. Its occupants are imagined as technologically advanced, economically differentiated and, because of these advancements, forming organised, political societies. Accordingly, to some extent, territory is an extension of our imagination.

Territory is also a *cultural enterprise*. How we perceive and experience the natural landscape is encoded through cultural practices like maps, travel narratives, art, and story-telling. These cultural artefacts provide explanations based on the observations being made, and convey moral judgements about people-in-land through stories, lines, colours, and dots. The mapping of territory through these sources relays information not only about those being observed, but also those doing the observing. Self- and Other-identities are forged through these narratives as people try to make sense of their place in the world around them, and attempt to articulate their relationship to the environment and its many resources.

¹⁵ Michel Foucault, "Powers and Strategies: An Interview with Michel Foucault by the *Revoltes Logiques* Collective," in *Michel Foucault: Power, Truth, Strategy*, ed. Meghan Morris and Paul Patton (Sydney: Feral Publications, 1979), p 55. Foucault also further discusses his power/knowledge dynamic in *Archaeology of Knowledge*, where he elaborates power as an artefact of the ability to organise knowledge as 'truth claims', the capacity to determine what lies within a particular discourse (ie. *oeuvre*). Also see, M. Foucault, *Archaeology of Knowledge* (Routledge, 2007).

Over time, however, our perceptions, experiences and representations of the land and our environment are further encoded through the forms of social and political organisation, and the legal rules that we, as a society, develop. These can be simple and localised. An example of this would be, the potlatch ceremonies used by Aboriginal communities in North America to resolve boundary-disputes by an invitation to negotiate through feast and the exchange of gifts.¹⁶ Or they can be more complex and geographically-dispersed, such as legal enactments under international law which delimit States' maritime boundaries.

Territory, in this sense, becomes an artefact of power. Our image of it is reproduced and preserved by the institutions, forms of organisation, and the rules that we produce to prevent that image from being eroded. One of the ways in which we safeguard our conception of our space is by enclosing it through the implementation of boundaries that are meant to keep undesirables (i.e. those that challenge our conception of space) out. Sometimes these boundaries are not material but imagined.¹⁷ Another way in which our conceptions of our environment are protected is by enabling enforcement bodies, like the military which protect and preserve the boundaries of our space, or authorising State agents to reinforce our conception of space through political rhetoric which pivots on the idea that 'our space' is a sacrosanct and natural component of our sovereignty.

Accordingly, we can say that territory is also an expression of *jurisdiction*, meaning that it provides us with a material representation of the legitimacy and limits of our political community's power; the limits of our law's expression, and the proximate location where our law and power ends and another political community's begins. McVeigh and Dorset put forth an interesting dual conception of jurisdiction, arguing that in one sense jurisdiction can be understood precisely in the way that I described above, as "part of a rival metaphysics of law."¹⁸ Jurisdiction represents the 'worlding' of law, "encompassing the tasks of the authorisation of law, the production of legal meaning and the marking of what is capable of belonging to law."¹⁹ On the other hand, they claim that jurisdiction represents the "exercise of a technology of law,"²⁰ which produces a "relation to life, place, event, through processes of codification and marking."²¹

¹⁶ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto, 2012), p 41.

¹⁷ As in the case of national identity that is coterminous with the territorial borders of the State. Our national identity keeps our territory, imaginatively, from being accessed by people like aliens, non-citizens, refugees.

¹⁸ Shaun McVeigh, ed. *Jurisprudence of Jurisdiction* (Abingdon, Ox: Routledge-Cavendish, 2007), p ix.

¹⁹ Shaunnagh Dorsett and Shaun McVeigh, "Questions of Jurisdiction," in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (Abingdon, Ox: Routledge-Cavendish, 2007), p 5.

²⁰ Shaun McVeigh, ed. *Jurisprudence of Jurisdiction* (Abingdon, Ox: Routledge-Cavendish, 2007), p ix.

²¹ Shaunnagh Dorsett and Shaun McVeigh, "Questions of Jurisdiction," in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (Abingdon, Ox: Routledge-Cavendish, 2007), p 5.

It is this second understanding of jurisdiction, jurisdiction as an exercise of a technology of law, that captures the essence of what this thesis has set out to illustrate. As an expression of jurisdiction, territory does not only make material the exercise of legal and political power, but it is also a composite of historical events, relationships, processes, and arrangements that have taken place through struggles for power between diverse normative communities that have found themselves in the same place, at the same time. In this sense, we can say that territory has emerged out of a community's struggles for recognition against competing normative structures and institutions; recognition of, at different times, their humanity, their capacity for sovereign self-government, and their right to cultural autonomy.

Territory, as we understand it today – as bounded, owned, and culturally-divisible - is *one* expression of how these conflicts have played out. Dorsett and McVeigh's edited volume present numerous other expressions of jurisdiction. These range from Haldar's view that the regulation of 'sublime' pleasure legitimised the common law's intrusion into its overseas colonies and made possible the exercise of extra-territorial jurisdiction,²² to Godden's and Dorsett's work, which analysed the expression of jurisdiction as it emerged through the regulation of bodily sexual desire²³ and death.²⁴ Societies exercise their power and give meaning to their law by expressing it through a number of different mediums Godden, Dorsett, and Haldar consider the 'body' as one such medium. This thesis, on the other hand, considers space in the form of land and geography as a second medium through which political and legal power is given meaning.

While territory is conventionally conceptualised as a bounded area of land under the authority of a single governing entity (the State) and composed of a singular politico-cultural community (the nation),²⁵ this thesis seeks to understand the micro-level processes through which this representation of space takes form. Territory is the product of multiple different forces at work – from literature, to art, to science, to law and politics. Relations of power inform each of these sources as they struggle to give land and environment meaning. The subject of this thesis is to analyse some of these sources, and demonstrate how they inspire the political and legal making of territory and how this, in turn, shapes the expression of political and legal jurisdiction. The technologies of territoriality, which I discuss at great length in Chapter Two, provide the basis for jurisdiction by imagining, narrating, and providing visual documentation of territory. Territory,

²² Piyel Haldar, "Jurisdiction and the Colonisation of Sublime Enjoyment," in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh and Shaunnagh Dorset (Abingdon, Ox: Routledge-Cavendish, 2007).

²³ Lee Godden, "A Jurisdiction of Body and Desire: Exploring the Boundaries of Bodily Control in Prostitution Law," in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (Abingdon, Ox: Routledge-Cavendish, 2007).

²⁴ Shaun McVeigh, "Subjects of Jurisdiction: The Dying, Northern Territory, Australia 1995-1997," in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (Abingdon, Ox: Routledge-Cavendish, 2007).

²⁵ Benedict Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*, Rev. ed. (London: Verso, 2006).

therefore, emerges not as a natural and concrete setting that is simply 'lying there', but the product of a number of different technologies that aim to situate, locate, position, and fix jurisdictional authority.

My analysis, throughout this thesis, reveals territory as a heterogeneous, multi-dimensional conceptual framework, which is produced through a variety of social, political, literary, and legal devices. I use the concept of territory as an optic through which to study the geographic dimensions of colonialism and the contemporary marginalisation of indigenous communities. At the same time, however, I portray territory as the product of Imperial-Indigenous struggles. This means that territory does have an 'indigenous component'. While it may appear that I spend a good part of this thesis unravelling the ways in which European perceptions and experiences of their overseas colonies shaped the concept of territory, my aim is to highlight how territory is the product of contestation between normative communities seeking recognition. At the moment, a European structuring of our social and political environment - the ways in which we envisage political and legal jurisdiction - is best expressed through the current concept of territory, but I argue that this can and may change.

To this end, I also devote time and space to discussing Aboriginal and native conceptions of space and geography, and highlight the political conflicts that underlie these varied visions of space. I dispute the argument that territory is produced through coherent and unidirectional exercises of power (the 'West' defining and narrating the 'East'), and refer to how territory has the potential to be both a mechanism of regulation, but also a vehicle for empowerment and emancipation.²⁶ This is because, as a particular representation of space and people, dominant perspectives are open to multiple, and often contesting alternative representations of space and identity (counter-exercises of power).²⁷ As a result, the penultimate chapter of my thesis uses this discussion of dominant and minority conceptions of space to theorise a potential solution to contemporary struggles for recognition. In this chapter I suggest that we may overcome the divisive tendencies of territory by adopting the idea of *coeval recognition*.

i. Place, Space, Geography and Territory

Over the course of this thesis I use space, geographic space, and geographies to mean very different things than territory. Space signifies the material openness of our environment, an

²⁶ See, for example, my discussion of recognition and Aboriginal title jurisprudence in Chapter Three.

²⁷ Felix Driver, "Power, Space and the Body: A Critical Assessment of Foucault's Discipline and Punish," *Environment and Planning D: Society and Space* 3(1985). Thus, when we speak of the production of knowledge being a technology of power, there is (and should always be) the possibility of a counter-production, a reality that *contradicts* and *defies* that production; for power cannot be exercised in the representation of something objectively real, but only through attempts to distort reality.

environment unmapped and bearing no symbols of social meaning. On the other hand, geographic space represents the environment understood as part of the terrestrial world, as Cartesian space. It is an environment that is understood as being 'located' through the application of symbols of latitude and longitude, directionality (e.g. north, south), through notions of contiguity and distance, and imagined in relation to other parts of the terrestrial world (e.g. 'landlocked', 'bordering the sea'). Geographies, on the other hand, are 'mapped' spaces, spaces that have been saturated with meaning through their incorporation into a variety of political/legal/cultural discourses.

Territory, therefore, is a very specific expression of geography. It is composed of the natural physical features of environment – land, topographic formations, and natural resources – but it is also a political and legal *concept* and a *jurisdictional exercise* imbued with symbolic and cultural meaning. When I speak of 'territory', therefore, I consider the ways in which societies have imagined it and drafted it. I explore the methods by which societies have 'exercised territory' in Chapters Two and Three, when I investigate colonial markers of ownership and postcolonial attempts to construct and enforce specific boundaries. And, conversely, I also look at the inverse relationship in Chapter Four, how space and geography have been used to legitimate the exercise of political and legal power.

The thesis also draws attention to other geographies that are modelled on 'territory', such as the Reservation and the protected areas of national parks. These are modelled on similar ideas about social interaction and organisation because they represent geographies that have been 'claimed' through various markers of possession and ownership and through occupation and settlement. These are geographies that are thoroughly mapped through the use of boundaries and enclosures which are meant to regulate outside access to the claimed space, and often these claims of ownership are projected by material and immaterial means (e.g. border-control checkpoints and cartography).

In my analysis, I further reveal that the moment when the political and legal manifestations of territory appear most powerful, is the precise moment in which their discursive power is weakest. For example, in Chapter Four I discuss how Pakistan has accorded its Pakhtun community a unique right of territorial autonomy. This is in the hope that a degree of autonomy will subdue their demands for secession and thus allow the State to maintain its territorial integrity. The Pakhtun's people's right to uninterrupted cultural practice has been granted subject to conditions that the Pakhtuns of the Tribal Areas have no access to domestic courts. As courts have been identified (in Chapter Three) as one of the primary modalities through which territorial visions of space are reproduced, the inability of the Pakhtuns to engage with the State

using the domestic court system threatens the discursive power of territory by foreclosing opportunities for negotiating a shared vision of space through which to determine important questions about the political and legal authority of both normative communities. In the absence of courts as a setting for dialogue and mutual-decision-making about the contours and details of territory, its ordering of social relations remains extremely fragile.

B. Imagined Geographies

The power of spatial representations as distortions of reality is perhaps best illustrated through Said's work on Orientalism. Said's reading of the imagined geographies of the Occident and Orient²⁸ has served as the basis for countless other cultural studies of discursive power. Examining English and French literature and drawing on Foucault's power/knowledge dynamic,²⁹ Said develops the argument that Orientalism, and the identities and mentalities mapped on to it, is a cultural project initiated by the West in order to categorise, classify, and contain the East. In so doing, he argues, the project of Orientalism reveals to us much more about the preoccupations and anxieties of the Occident, than it does about the identity and personalities of the Orient.

A reading of Said's work reveals two interesting insights. One, as Wigen and Lewis note, is the absence of a geographic critique.³⁰ The second is a need to integrate law and legal representations of alterity and difference in his analysis of the process of Orientalism. A study of the geographic dimensions of Orientalism is important for several reasons. For one, it is the compression of geographic distance, brought about by technological advancements in overseas travel that made societies more cognisant of social difference, including the presence of different cultural, linguistic, and religious practices. It was this European *intrusion* into foreign places and communities that put in motion the processes of Orientalism. What is more, the tendency to culturally differentiate and to inferiorise became necessary in order to legitimise these relations of property, spatial possession and ownership, and how this literal 'taking' of space led to the displacement of occupying people and the resettlement of emigrating populations. Thus, to leave the geographic element unexplored fails to draw the necessary attention to how relationships were cultivated or limited through the notion of property and ownership. Specifically, it leaves unchallenged the idea that space can be apportioned and possessed, and continues to uphold the

²⁸ Edward Said, *Orientalism*, vol. 1 (London: Vintage Books, 1988).

²⁹ Through which Foucault argues that control over the ordering and organisation of knowledge about an object is to exercise power over that object. See, Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings*, ed. Colin Gordon (New York: Random House, 1980), p 109-34. Also see, ———, "'The Order of Discourse'," in *Untrying the Text: A Post-Structuralist Reader*, ed. Robert Young (Boston: Routledge, 1981).

³⁰ See, Martin W. Lewis and Karen E. Wigen, *The Myth of Continents: A Critical Metageography* (Los Angeles: University of California Press, 1997), p 47-9. Wigen and Lewis claim that this can partially be attributed to Said's background as a literary theorist, and also to the fact that perhaps he never meant for the Orient and Occident to be defined as geographic categories.

view that this division of our environment is natural. This, as I more clearly explain in Chapter Three, is certainly not the only way in which communities envisage and imagine their land and environment. This thesis draws on Said's methodology of literary analysis (see Chapter Two) to appraise structures of legal and political governance, but it also supplements this analysis through a focus on geography and on the relationship between legal representation and the process of creating an inferior non-Western Other.

Said's analysis also sometimes reduces the complexities of the colonial encounters to a relation structured by European domination and non-European oppression.³¹ In analysing the spatial simultaneity of the Orient/Occident, as I do in Chapter Four with my case study of Pakistan, it is possible to draw out the interconnections between the Orient and Occident. This approach also becomes essential for arguing the possibility of hybridity and drawing further attention to how the Orient and Occident may be aspects of one another. The Orient, is no longer something *over there*. Our postcolonial and multicultural world has made it so that both the East and West comeingle within the same political space, often producing subjects characterised by hybridity.³² At the same time, however, the co-presence of the East and West in the same location has given rise to new tendencies to temporalise cultural difference, and to imagine areas of space as being stuck in time. This may, perhaps, represent modes of overcoming the dislocation of the self/Other binary through which societies develop their self-identities. And thus a geographic analysis of Orientalism reveals new tendencies of difference-making, new discursive strategies for exercising power and control in the present and despite the new paradigm of a liberal politics of equal minority rights. As I demonstrate in both Chapter Three and Four, this has had some very interesting consequences for how States imagine and protect their minority communities.

³¹ He notes, "in quite a constant way, Orientalism depends for its strategy on this flexible positional superiority [European superiority over Oriental backwardness], which puts the Westerner in a whole series of possible relationships with the Orient without ever losing him the relative upper hand." Edward Said, *Orientalism*, vol. 1 (London: Vintage Books, 1988), p 7-8.

³² Bhabha and Young's work develops the notion of hybridity, as a dislocation of identity, the possession of 'self/Other' tendencies that disrupt our unified and coherent conceptions of self-identity. In particular the notion of hybridity becomes pronounced within postcolonial discourse, through examinations that reveal the ambiguities between the coloniser/colonised binaries through which we understand the colonial experience. See, Robert J.C. Young, *Colonial Desire: Hybridity in Theory, Culture, and Race* (London: Routledge, 1995). Also see, Homi Bhabha, "Of Mimicry and Man: The Ambivalence of Colonial Discourse," *October* 28(1984). Bhabha's theory of liminality – which proposes a shift away from essentialising and reifying identity – can be described as a new way of thinking about identities and social transformation that moves beyond what we currently understand as a series of separate and compartmentalised 'posts' – postcolonial, postmodernism, postfeminism. It offers up a framework for analysis that rejects a linear view of history – one that stretches from primitivity to progress – and rejects approaches that separate theory from practice. ———, *The Location of Culture* (New York: Routledge, 1994). practice, and undertakes a more holistic investigation of cultural and national identity-formation. See, ———, *The Location of Culture* (New York: Routledge, 1994). To some extent we can also find evidence of hybrid identities in Fanon's work, particular when he discusses the native's desire and longing to be recognised as a 'White man', suggesting the colonial subject's contempt for the culture which writes him off as inferior, simultaneously with an envy that underwrites his desire for inclusion. See, F. Fanon, *Black Skin, White Masks* (Pluto Press, 1986).

This thesis also focuses on the way in which, not only the processes that Said discusses in *Orientalism*,³³ but also the legal narratives that I discuss in Chapter Three and Four, are important representations of identity and history. In this way, the thesis contributes to our understanding of the role of law in reproducing the Oriental/Occidental characterisation of culture and cultural difference.

Piyel Haldar's *Law, Orientalism and Postcolonialism* compensates for some of the gaps in Said's analysis of law and legal representation as part of the process of Orientalism. In this book Haldar discusses the shaping of legal subjectivity through the regulation of pleasure, particularly transgressive expressions of pleasure (i.e. where the Orient or East 'becomes the scene of excess').³⁴ Like Said, Haldar undertakes a literary analysis of European travel documents and journals to reveal how the experiences of the colonial encounter resonate within contemporary definitions of legal subjectivity. Through this analysis Haldar problematizes the process through which law makes claims to universal validity, suggesting that the urge to do so emerges only in those instances when "Occidental legal cultures seek to assimilate those who are initially outside its jurisdictional reach."³⁵ Accordingly, Haldar reveals the colonising tendencies of a particularist law which projects itself as universal. At the same time, Haldar draws attention to how these places of excess were also a cause for European marvel, and how this realisation of envy disrupts European notions of subjectivity by bringing into sharper focus the potential for hybridity. These 'crises in identity', an awareness of the tension between European desire and disdain for excessive enjoyment is rectified through the temporal dislocation of the civilised subject, as a 'modern' subject in which this urge for excess is tempered through the rule of law.³⁶ Haldar, therefore, develops a detailed and persuasive narrative of the complexities of the colonial encounter and reveals to us how these subjugating discourses are reproduced through the language of law.

C. Critical Legal Enterprise

In discussing how law encodes and further circulates subjective experiences and partial perspectives this thesis also unsettles the legal categories that emerge through this encoding of space and the emergence of territory. Like Haldar I also question how the legal categories of identity and culture have the effect of privileging certain ideologies, perspectives, and interests

³³ Said broadly examines a range of "intellectual, aesthetic, scholarly, and cultural energies" that operate to construct the Orient. Specifically he studies the Orient as produced through European anthropological and historical accounts, sociological studies, and literary narratives. See, Edward Said, *Orientalism*, vol. 1 (London: Vintage Books, 1988), p 9-28.

³⁴ P. Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (London: Routledge Cavendish, 2007).

³⁵ *Ibid.*, p ix.

³⁶ *Ibid.*, p 127-50.

and how liberal law has the tendency to operate simultaneously as a vehicle of emancipation (for some groups) while also existing as a form of regulation for others (see Chapter Five).³⁷

Thus, the current thesis also draws inspiration from the critical legal enterprise, rooted firmly in poststructuralist thinking. Claiming that critical scholarship typically steers away from entangling itself in “unwarranted claims to truth and correspondence to reality,”³⁸ Hunt describes the critical project as questioning the value and underpinning interests of theories about social institutions and processes, including law. Critical legal theory concerns itself with highlighting the ways in which the law and dominant legal discourse work to oppress mainstream society by reinforcing the ideologies and structures that maintain the authority of those in positions of power.

Drawing on a number of disciplinary perspectives, i.e. sociology, literature, geography, and using (amongst others) political, ethical, and epistemological analysis, critical legal theorists are able to capture uneasiness with, and resistance to, the state of legal scholarship and practice. Thus, much of the work of critical legal theorists is focused on unsettling the often impartial and universal claims of law, emphasising the ways in which the law and legal categories work to reproduce the subjugation and domination of less powerful groups, and to authenticate certain representations of identity and history. Many of the most vocal advocates of critical legal theory write broadly within the discourse of postcolonial theory,³⁹ feminist critiques of the law,⁴⁰ legal geography,⁴¹ or the sociology of law.⁴² Much of this literature uncovers the ways in which law reproduces inequalities of race, culture, and gender by shaping notions of subjectivity,⁴³ and often reveal law to be a cultural process shaped by economic, social, and political forces operating within contemporary societies. The critical paradigm becomes useful for my analysis because this thesis frequently draws attention to the unstable character of categories in both law and geography

³⁷ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London, UK: Reed Elsevier, 2002).

³⁸ Alan Hunt, "The Critique of Law: What Is 'Critical' About Critical Legal Theory," *Journal of Law and Society* 14, no. 1 (1987): p 9.

³⁹ P. Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (London: Routledge Cavendish, 2007).

⁴⁰ Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law," *Journal of Law and Society* 14, no. 3 (1987). Anne McClintock, "The Angel of Progress: Pitfalls of the Term 'Post-Colonialism'," *Social Text* 31/32(1992).

⁴¹ Nicholas Blomley, David Delaney, and Richard T. Ford, eds., *The Legal Geographies Reader* (Oxford: Blackwell Publishing, 2001). Also see, David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making* (Abingdon, Oxon: Routledge, 2010). Also see, Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, eds., *Spatialising Law: An Anthropological Geography of Law in Society* (Surrey, UK: Ashgate, 2009). Also see, Sherene Razack, ed. *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002).

⁴² Eugen Ehrlich and Nathan Isaacs, "The Sociology of Law," *Harvard Law Review* 36, no. 2 (1922). Also see, Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism," *J. Legal Pluralism & Unofficial L.* 47(2002).

⁴³ P. Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (London: Routledge Cavendish, 2007). Also see, Brenna Bhandar, "Plasticity and Post-Colonial Recognition: 'Owning, Knowing, and Being'," *Law Critique* 22(2011).

which are assumed to be coherent and stable. For example, my analysis in Chapter Three questions the legal definition of culture, subjectivity, and identity and compares it to how people self-perceive to reveal inherent inconsistencies. Similarly, in Chapters Two and Four, I question to what extent topography and climate are constant descriptors of reality, and suggest that they may be malleable categories that can be manipulated to reveal or conceal different human relationships. Since the thesis proceeds from the premise that space is political, and that it is a social construct, many of the critiques that I employ draw inspiration from the critical project and its scepticism of permanent and 'scientific' categories of social difference.

D. The Use of 'Postcolonial'

The term 'postcolonial' is contentious, and is typically employed in two different ways. The first is that it describes the end of a historical set of relationships that led to the exploitation and dispossession of native groups encountered during the European commercial expansion into non-European lands.⁴⁴ 'Postcolonialism', from this perspective, is about analysing how these native communities are coming to terms with their histories of marginalisation and its longstanding effects on political, economic, and social life during the process of decolonisation. In this sense, 'postcolonialism' is used interchangeably with 'imperialism', signifying the military and economic might of European empires. Childs and Williams write that, in understanding the postcolonial condition from this perspective, the question then becomes 'whose colonialism' are we referring to? Are we to adopt a Euro-centric view, in which we analyse the discontinuation of English/French/Spanish/Portuguese/Dutch Imperialism? Or, do we go back even further to Incan and Ottoman conquests, which relied on similar conceptual frameworks?⁴⁵ Childs and Williams' query brings to the forefront the reality that the colonial mentality was never unique to Europe, and that for many centuries before European colonialism, Empires have attempted to acquire resources and implement their forms governance through violently suppressing groups that they perceived as being an impediment to these desires.

Second, 'postcolonial' refers to a contemporary intellectual movement that has grown out of the colonial encounter, and by which we assess the cultural, political, and economic ideologies and institutions that now regulate, discipline, and shape our world. In recognition that colonialism led to the decimation of indigenous histories and knowledges, postcolonial theorists are intent on exposing how colonial modes of seeing and patterns of understanding continue to inform contemporary political, legal, and social discourse. For instance, authors such as Said believe that the 'West' continues to exercise intellectual and discursive power over the 'East' by constructing

⁴⁴ Peter Childs and R.J. Patrick Williams, *An Introduction to Post-Colonial Theory* (London: Prentice Hall, 1997), p 1.

⁴⁵ *Ibid.*, p 1-2.

and circulating an 'Oriental' identity which stands in stark contrast to Euro-Western self-perceptions.⁴⁶ From Said's work we are able to draw out the significance of cultural knowledge and representation to the exercise of colonial power. Being able to *speak for* the native has profoundly enhanced the West's ability to control the native in ways that are more enduring and less visible than the exercise of political and/or military power.

Postcolonial studies is grounded in the view that colonialism was not simply a political project to extend European power across oceans in the form of territorial and political expansion. It was also a *cultural project* that aimed to recreate non-European societies in the mould of Europe.⁴⁷ Often this took the form of subjecting native populations to widespread physical violence. Sometimes it was expressed *via* the destruction of native culture through calculated policies of acculturation through European-styled education,⁴⁸ religious conversion,⁴⁹ and a displacement of native forms of dispute resolution and institutions of governance in favour of European ones.⁵⁰ The use of colonialism as simply a descriptor of European overseas travel and settlement, therefore, diminishes the tragedies of the encounter; it entirely effaces the acts of conquest and domination that were essential components of this encounter.⁵¹ But, it also conceals from us the significance of colonialism as an event marked by knowledge transmission, ideological domination, and institutional transplantation.

To, therefore, use the term 'postcolonial' as a descriptor for the discontinuance of European Imperialism falls short of taking into account the enduring consequences of this expansion, some of which include the economic and political depression of indigenous communities through the widespread dispossession and appropriation of indigenous land;⁵² the longstanding social problems brought about through the devastation of indigenous forms of political and legal ordering;⁵³ and feelings of social alienation and non-belonging perpetuated by the subjection of indigenous groups to alien forms of social and political organisation and education, and the

⁴⁶ Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1994).

⁴⁷ Bernard Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton, NJ: Princeton University Press, 1928).

⁴⁸ George E Urch, "Education and Colonialism in Kenya," *History of Education Quarterly* (1971). Also see, Isabelle Knockwood and Gillian Thomas, *Out of the Depths: The Experiences of Mi'kmaw Children at the Indian Residential School at Shubenacadie, Nova Scotia* (Nova Scotia: Roseway Publishing, 1992).

⁴⁹ David Murray, "Spreading the Word: Missionaries, Conversion, and Circulation in the Northeast," in *Spiritual Encounters: Interactions between Christianity and Native Religions in Colonial America*, ed. Nicholas Griffiths and Fernando Cervantes (Birmingham: University of Birmingham, 1999).

⁵⁰ Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988).

⁵¹ Ania Loomba, *Colonialism/Postcolonialism 2nd Edition* (New York: Routledge, 2005), p 7.

⁵² Cole Harris, "How Did Colonialism Dispospossess? Comments from an Edge of Empire," *Annals of the Association of American Geographers* 94, no. 1 (2004).

⁵³ Taiaiake Alfred, "Colonialism and State Dependency," *Journal of Aboriginal Health* 5, no. 2 (2009).

inferiorisation of their cultural institutions and identities.⁵⁴ Equally important, and perhaps less visible, is the ways in which colonial knowledge has become embedded within the politico-legal structures which shape postcolonial life. Colonialism has produced groups of indigenous people with fractured identities; identities that have been partly shaped by their self-perception, but also by colonial signification. For many of these people these fractured identities have left them feeling out of place in settled communities, while also inspiring a sense of detachment from their own cultural groups.⁵⁵

Conversely, however, the term 'postcolonialism' has also been described as an empowering discourse. It can suggest a more nuanced and pluralistic way of thinking about the world that encompasses the events and effects of imperialism and decolonisation. The 'post' of postcolonialism has been described as signifying a 'disorder', an intellectual denunciation of the colonial project and a joint "investment in a politics of anti-colonialism."⁵⁶ From this perspective 'postcolonialism' describes the continued "contestation of colonial dominance and the legacies of colonialism."⁵⁷ It can represent new ways of thinking about the self that takes into account and continuously challenges singular (or singularising) colonial representations of gender, culture, race, and ethnicity,⁵⁸ to embrace oneself as a unique hybrid of cultural interaction and miscegenation.⁵⁹ Postcolonial thinking, therefore, can and often does reflect a dynamic mosaic of a "related set of perspectives, which are juxtaposed against one another, on occasion contradictory."⁶⁰ During argues that postmodernism is the intellectual enterprise through which the postcolonial condition is challenged. He describes it "as that thought which refuses to turn the Other into the Same. Thus [providing] a theoretical space for what postmodernity denies: otherness."⁶¹ And yet, there is also the critique that the postcolonial condition heavily circumscribes the Other's speech so that the subaltern is never genuinely able to speak using his own language and modes of signification.⁶²

⁵⁴ Patricia Monture-Angus and Mary Ellen Turpel, *Thunder in My Soul: A Mohawk Woman Speaks* (Fernwood Publishing Halifax, 1995).

⁵⁵ Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Winnipeg, MB: Fernwood Publishing, 1999), p 8.

⁵⁶ Stephen Slemon, "The Scramble for Post-Colonialism," in *De-Scribing Empire: Postcolonialism and Textuality*, ed. Alan Lawson and Chris Tiffin (London: Routledge, 2002), p 15.

⁵⁷ Ania Loomba, *Colonialism/Postcolonialism 2nd Edition* (New York: Routledge, 2005), p 16.

⁵⁸ F. Fanon, *Black Skin, White Masks* (Pluto Press, 1986).

⁵⁹ H.K. Bhabha, "Culture's in-Between," in *Questions of Cultural Identity*, ed. Stuart Hall and Paul Du Gay (London: Sage, 1996).

⁶⁰ Robert JC Young, *Postcolonialism: A Very Short Introduction* (Oxford University Press, 2003), p 6-7.

⁶¹ Simon During, "Postmodernism or Post-Colonialism Today," *Textual Practice* 1, no. 1 (1987): p 32.

⁶² Gayatri Spivak, "Can the Subaltern Speak?," in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (London: MacMillan, 1988).

It is in this vein that I employ the term 'postcolonial'. Rather than signifying the temporal aftermath of colonialism, postcoloniality should be perceived as an autonomous reality of its own that is partially contingent on the consequences of the colonial encounter, but uniquely different from it as well. To see the postcolonial as merely an extension of colonialism, or to see it as a rupture or break from colonialism, is to devalue non-European and indigenous contributions to the era of both coloniality and postcolonality. This, I argue, diminishes the analytical potential of postcolonial thinking. At the same time, however, we must understand that the postcolonial condition is also marked by ways of trammelling subaltern subjectivity and expression. The subaltern's voice is continuously tempered by forcing the Other to express his/her sense of self through the language, knowledge, and institutions of colonialism. The transfer of European knowledge and culture is a legacy of the colonial encounter that continues to have significant influence over how the postcolonial subject is able to represent and express himself.

Consequently, I employ 'postcolonial' as a way of drawing attention to conditions of cultural and intellectual intermixing, a situation characterised by deep ambivalence. The postcolonial condition is marked by the presence of identities that can no longer be easily differentiated along the coloniser/colonised dichotomy. It represents a reality that is equally shaped by subaltern challenges to enduring European political and legal discourses, as it is by subaltern desires to be recognised as possessing a moral status equal to that of their once-colonisers. As Fanon argues, a lasting effect of colonialism is an eternal longing of the Black man to be recognised as White.⁶³

As a result, in adopting terminology like 'postcolonial law' and 'postcolonial legal and political structures', I use the term to describe political life and legal systems constructed through moments of contestation between dominant European frameworks of law and legality and their indigenous counterparts. Postcolonial law is characterised by deep hybridity, a hybridity that this thesis argues, contemporary governments seem to downplay, and liberal law seems to discount. Accordingly, one of the aims of this thesis is to reveal this interrelationship, and to develop better methods by which they can coexist *equally* rather than *hierarchically*. Over this course of analysis, 'postcolonialism' is therefore understood as a stage in history characterised by the disruption of previously accepted categories of culture, race, and ethnicity, and signifies the production of legal, political, and social systems that borrow heavily (though not always equally) from both European and non-European sources.

⁶³ F. Fanon, *Black Skin, White Masks* (Pluto Press, 1986).

i. Contributions to Postcolonial Thinking

The current thesis contributes to the pre-existing literature on postcolonial theory by drawing attention to the geographical and spatial dimensions of colonialism. Consequently, this work lies at the interface of cultural geography and postcolonial studies. It aims to provide insight into how the colonial encounters were structured by particular conceptions of the world as an open space, awaiting European arrival and inviting European possession. This view that foreign lands were, essentially, 'for the taking' immensely influenced how European peoples understood their relationship to indigenous peoples and, ultimately, how that relationship was reflected through European cultural narratives. In this thesis I evaluate several of these narratives in the form of cartography, ethnography, and travel writing. According to these accounts, the European appropriation of native lands was legitimate given the former's higher level of civilisation. This level of development was evidenced by pointing to the presence of relatively comprehensive and advanced legal and political arrangements and institutions.⁶⁴ These accounts, therefore, reproduced foreign lands and peoples according to a very distinct, and not always inclusive, ordering of colonial space, which structured native-European relations in such a way so as to continuously deprive native peoples of voice and capacity for self-rule.

A symptom of the postcolonial condition is the questioning of colonial classifications and mappings of foreign lands and people, and the rethinking of legal and political principles that have been based on these colonial geographies. Sidaway writes that the "impulse within postcolonial approaches [is] to invert, expose, transcend, or deconstruct knowledges and practices associated with colonialism."⁶⁵ He aptly notes that:

Any postcolonial geography 'must realise within itself its own impossibility', given that geography is inescapably marked (both philosophically and institutionally by its location and development as a western-colonial science. It may be the case that western geography bares the traces of other knowledge...but the convoluted course of geography, its norms, definitions and closure (inclusions and exclusions) and structure cannot be dissociated from certain European philosophical concepts of presence, order and intelligibility.⁶⁶

It is this relationship between the geographic dimensions of colonialism and the contemporary presence of postcolonial cultural geographies that this thesis sets out to critically assess. Some of the cultural geographies that it considers is the Aboriginal Reservation and the Tribal Areas of Pakistan. I examine how these geographies have been produced through colonial conceptions of space and social relations. In so doing, this work questions the value and significance these geographies have for the protection of cultural pluralism and social diversity. At the same time,

⁶⁴ See Chapter Two for a more detailed discussion.

⁶⁵ James Sidaway, "Postcolonial Geographies: An Exploratory Essay," *Progress in Human Geography* 24, no. 4 (2000): p 592.

⁶⁶ *Ibid.*: p 592-3.

this thesis contributes to the field of postcolonial studies by drawing attention to the political nature of geographic knowledge, and highlighting the ways in which colonial representations of space continue to have significance for the way in which contemporary societies imagine and operationalise native-State relations.

E. Situating the Current Research

This thesis uses a methodological approach similar to those of Said and Haldar, using literary analysis to develop a narrative through which to critique contemporary legal practice and discourse. Like Haldar I develop the idea of law as a narrative that reflects colonial conceptions of native identity, history, and subjectivity. However, rather than highlighting pleasure (and its regulation) as a site of Occidental power, I argue that Occidental power is also exercised through representations of landscape, climate, and topography, all of which have the effect of naturalising ideas about native cultural and racial inferiority. This is perhaps most powerfully discussed in Chapter Four, where colonial conceptions of Pakhtun identity, developed by reference to their turbulent and challenging landscape, are later used to legitimise the postcolonial State's unwillingness to extend its law to the Tribal Areas.

Through this thesis I analyse how imagined geographies, modelled on fantasies about and anxieties related to the unfamiliarity of space, are incorporated into and authenticated through political and legal discourse. I go on to say that, through this process, these imagined geographies begin to have very important consequences for how contemporary societies understand and manage social pluralism. Equally importantly, these geographies also influence how dominant groups in society come to understand their relationship with the Other through the invocation of binaries such as civilised/savage and modern/traditional. In particular, I examine the geographies of the Reservation and the protected areas of public parks. The Reservation often work to reproduce the myth of State sovereignty by, for example, giving the impression that the land outside of the boundaries of the Reserve or to which there is no underlying native title, were essentially *terra nullius* and open to the colonial State's claims of possession. The space incorporated into the Reserve is imagined as locked in time, a space filled with the traditional and archaic practices of a community uninterested in modernisation.

Similarly, in my discussion of the imagined geographies of national parkland I reveal how spaces inhabited by native communities are imagined as pristine wilderness in need of State protection. These zones are neutralised of all human content, and are naturalised as spaces simply 'lying there'. The value of these pristine areas (for contemporary society) emanates from the fact that they have not been 'tainted' by human inhabitation and contact, and so they must be protected for common enjoyment. The irony of this discourse lies in the fact that this very concept of the

protected areas is, itself, a politics of exclusion, 'tainting' the environment by working to empty this area of its native residents. Through an analysis of these narratives, it becomes clearer that the politics of territory play a crucial role in excluding and othering populations.

Chapter Two, Three and Four, therefore, draw attention to the intimate connection between law and the social imaginary. While revealing the emergence of European law in the colony as having the specific aim of rendering settler life more predictable, my analysis demonstrates how this was achieved by controlling the alterity and unfamiliarity of the landscape and its occupying normative structures through discursive reinterpretation. This process of control and power took place through a number of techniques of Occidental Legality: first, through the techniques of Imperial witnessing and later through structures of governance and legal narratives. In both instances the colonial gaze has the tendency to distort not only the natural environment, but also the relationships that are imagined and operationalised within in. For example, I reveal through my analysis of the aesthetics of map-making how the settler/native relationship is understood as one of European benevolence and as an extension of its desire to bring 'civilisation' to the savage natives (see Chapter Two). The implementation of European legal and political structures within the colony helped to temper the anxieties that the strangeness of the new environment brought and, in many cases, helped to legitimise the questionable treatment of native peoples (see my discussion of Vitoria's notion of *jus gentium*).

In Chapter Five I move beyond critique to offer some initial suggestions for future reflection on how contemporary societies can move away from the oppressive tendencies of Occidental Legality and secure better conditions for more inclusive forms of pluralism. One of the fundamental criticisms of poststructuralist critique is that it often deconstructs prevailing theories, categories of analysis, and systems of thought without developing something in its place. For some authors, poststructuralist critiques like the one undertaken by Said often reproduce their own essentialised categories of identity and univocal histories (albeit from a reverse, minority perspective, rather than the traditional dominant view).⁶⁷ To some degree then, these critical perspectives offer little optimism for a world believed to be structured through exercises of *realpolitik*. Going back to the quote from Low at the beginning of this thesis, which relays how evidence of the falsity of one's convictions does not immediately erase the psychic investments which inform those beliefs, I acknowledge that pointing to territory as an imagined geography, underwritten by perceptions of racial inferiority, cultural difference, and European cultural dominance, does not automatically displace the value that territory has for enabling the exercise

⁶⁷ Homi Bhabha, "The Other Question: Homi K. Bhabha Reconsiders the Stereotype in Colonial Discourse," *Screen* 26, no. 4 (1983).

of political, economic, and social power for minority communities. I recognise that the discourse of territory has become essential to demands for recognition of autonomy and rights of self-determination.

Thus, while the first three chapters of the thesis reveal territory as a spatial form that has the effect of excluding social groups while continuing to masquerade as space that simply 'lies there', my aim is not solely to expose territory as an imagined construct. While that is certainly important, it is a task that has already been powerfully undertaken by a number of influential theorists, adopting a variety of different methods.⁶⁸ The aim of this thesis is two-fold. First, I demonstrate how territory is inspired by the timeless anxieties about racial and cultural difference, hybridity, and the proximity of racialised bodies to one's own. In so doing this thesis disrupts and complicates many of the claims of a postcolonial liberal democratic society, structured through the discourse of political inclusion and respect for diversity, while continuing to hold on to the possessed and culturally-divisible view of space as sacred and fundamental to the exercise of power. In my thesis, I bring to light the many ways in which territory, as a political and legal construct and an intellectual architecture, problematises the aims of 'post'-colonial States, intent on protecting pluralism, while also needing to safeguard their own claims to sovereignty and legitimate political authority.

But this thesis also acknowledges that territory is a hegemonic discourse that is structured through law and politics to shape the way in which contemporary societies define and understand their relationships with one another. As a hegemonic discourse the notion of territory, despite its problematic and partial roots, is a discourse that is often mobilised and brought into existence by the Other, the subaltern who has traditionally been the subject of Occidental Legality's oppressive processes. Territory is a powerful discourse of self- and Other-making that is so firmly rooted in how our world is organised that it becomes virtually impossible to 'unthink' it. For authors like Elden, territory must be 'thought historically'. From this perspective, the aim of critical discourse should be to reject ways of trying to undo territory. Instead, as Elden argues, we should undertake a reconsideration of the ways in which territory is created and reproduced, and understand the

⁶⁸ Storey, Blomley, Delaney, and Agnew to name only a select few. David Storey, *Territories: The Claiming of Space* (New York: Routledge, 2012). Also see, Nicholas Blomley, *Law, Space, and the Geographies of Power* (London: Guildford Press, 1994). Also see, John Agnew, "The Territorial Trap: The Geographical Assumptions of International Relations Theory," *Review of International Political Economy* 1, no. 1 (1994). Also see, David Delaney, "The Space That Race Makes," *The professional geographer* 54, no. 1 (2002).

reasons why “when we accept the territorial trap...[we] buy into a state-centred narrative that naturalises and normalises this way of thinking.”⁶⁹

Consequently, the last part of thesis discusses steps that contemporary societies can take to address the consequences of Occidental Legality. I introduce ‘coeval recognition’ as one constructive idea that can be a foundation for native demands for autonomy. While building on the existing theories of recognition put forth by authors like Charles Taylor and James Tully, coeval recognition better acknowledges the fluidity and dynamicity of human identities. In developing this model of recognition, I suggest three ways in which coeval recognition can be operationalised so as to account for the ambiguities within and overlaps between the identities of two encountering communities. Coeval recognition requires an acceptance of the fact that minority communities exist on the *same land at the same time*, and thus have equal moral claims to self-government and legal autonomy. Territory, I argue helps to conceal this crucial appeal by giving us the impression that legal autonomy requires spatial differentiation (i.e. two laws cannot govern the same space). It is this linking of territory and autonomy which has, I believe, foreclosed many opportunities for negotiation and compromise between the State and native communities.

It is for this reason that a politics of inclusion needs to move beyond the current arguments for ‘recognition’, ‘equality’, and ‘multiculturalism’, much of which adopt a territorial vision of space and social relations, towards an acknowledgement of coeval recognition. Some of the ways in which coeval recognition can be achieved include reducing limitations on the movement of the native body, because it is precisely the immobilisation of the native body, its fixing in space and time, which has been the primary objective of the processes of Occidental Legality since the first Imperial-Indigenous encounters. Instead, I argue that more inclusive forms of governance would restructure legal and political forms of governance through a respect and recognition of hybridity and the pursuit of self-reflective intercultural dialogue.

The narratives I set out and discuss in this thesis are not a complete and infallible account of imperial witnessing. Instead, this thesis is a very specific analysis of the colonial experience that draws out its implications for how contemporary societies and liberal law manage the presence of social pluralism today. In so doing, this investigation may generate further questions and lines of

⁶⁹ Stuart Elden, “Thinking Territory Historically,” *Geopolitics* 15(2010): p 757. Here Elden is referring to Agnew’s article about the presumptions underlying interrelations theory and our conventional understanding of the modern-nation State as rooted in ‘territorial’ relationships. Agnew highlights how three misconceptions that underpin this view: (1) that the nation-State is a clearly demarcated territorial unit; (2) that there is a clear distinction between domestic and foreign politics; and (3) that the borders of the State coincide with the border of the society that inhabits it. See, John Agnew, “The Territorial Trap: The Geographical Assumptions of International Relations Theory,” *Review of International Political Economy* 1, no. 1 (1994).

enquiry about the work and value of territory, the spatialisation of social difference, and the relationship between territory and power. These additional questions and lines of enquiry need to be examined because they reveal relationships and interactions that have, for much too long, been concealed from us.

My inclusion of historical methods and sources is important to understanding the present because I draw attention to the parallels between the social and political realities of the 'here and now' and the colonial past. This process is important because it allows us to understand the continuing significance of colonialism in the present, as well as encouraging a much needed re-evaluation of what are often assumed to be 'progressive' contemporary political and legal institutions and solutions to encounters between the Orient and Occident in the present (i.e. the challenge of Aboriginal rights and multiculturalism). The continuing significance of ensuring justice for native communities, as well as the continued prominence of diversity models of recognition and autonomy, means that these remain urgent and important questions. The colonial encounters of the past, which continue to influence political structures and legal institutions, as well as legal concepts, representations, and modes of reasoning, have significant influence on Indigenous politics and the regulation of diversity. Occidental Legality and colonialism can no longer be thought of as something that happened 'over there' and 'back then', with no relevance for the present. The effects of the Imperial-Indigenous encounters continue to resonate within contemporary forms of governance.

Chapter One

The 'Spatial Turn' in the Social Sciences

Canvassing the Literature on 'Space' and 'Place' and the Legal Geography of Territory

1. Introduction

In this chapter I draw attention to the politics of space and how geographic space has a history. Spatiality, by which I mean assigning spatial properties to events, phenomena, and relationships, locating them in space and through space, is how we reproduce the conditions that make certain forms of social interaction possible (or impossible). Space is an extension of the society in which it operates and is shaped by the society's culture and social conventions. In turn, this has an effect on how people experience space. Enduring and stable geographies are ones that become incorporated into a variety of different discourses and are made real through material (legal and political action). In this thesis I show that territory is an enduring and stable geography. Territory has the effect of naturalising our spatial experiences so that they come to represent passive and pre-political events. In so doing, territory makes certain relations and forms of discipline *less visible* to us and "hides the consequences of things from us."⁷⁰

In this chapter I analyse some of the existing literature in the area of socio-spatial studies and legal geography to defend two ideas. First, that space is political. By this I mean that space is constructed with a view to organising social and political life according to a particular, not always inclusive, vision. Second, that law has had a prominent role to play in the production and regulation of space, and this poses some very real impediments to liberal law's claims of neutrality, legitimacy, and universal application. At the same time, the relationship between law and space is dialogical and mutually constitutive. While law encodes particular human experiences and cognitive visions of space, space becomes an inert and passive setting for the crystallisation and reification of law and legal discourse. In critiquing 'the legal', this thesis typically uses the term 'law' in the conventional sense, meaning the rules and narratives that emanate from the State and its institutions. However, I am of the opinion that norms that have legal value for human communities need not be derived from a central governing authority. Conceptually, I understand law in a wider sense than positive law. This includes non-State forms of regularised social practice, as well as their underpinning enforcement mechanisms and modes of dispute resolution. Consistent with this broader conceptualisation of the legal, I will

⁷⁰ Edward W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989), p 6.

sometimes refer to 'native law' or 'tribal law'. This is an important caution that I want to state at the outset because often we perceive law as a closed and neutral system of rules that derives legitimacy and validity from the State. This thesis will demonstrate how grounding political authority in territory often reinforces this vision of State-power and has the consequence of minimising non-State forms legal normativity. At the same, law (in the traditional positivist sense) has had an important role in authenticating, reproducing, neutralising and circulating territory as a bounded, owned, culturally-divisible view of space.

The socially-constructed nature of space does not mean that spatialities are not 'real'.⁷¹ Very few people would deny the claim that territory has significant political and economic purchase, or that its material borders symbolise boundaries of cultural, legal, and political difference. As Forsberg notes, "constructions are always constructions of something; hence they are not entirely arbitrary and people are not able to design the world deliberately according to their wishes."⁷² This thesis, therefore, calls attention to the reasons why certain representations of space appear to us as seamless geographies. My aim is to uncover the types of social interactions, ideas of thought, and the forms of discipline that underwrite the geographies and how legal norms, processes, and institutions are able to hide this from us.

In this chapter I examine geographical and sociological accounts of geographic space, and draw attention to how these accounts contest and reinforce prevailing notions of space and geography. This chapter develops a theoretical frame of reference that will inform the analysis undertaken throughout this thesis. This chapter will also introduce, clarify, and elaborate key terms that I have used and developed to study the phenomenon of territoriality, including key terms such as hybridity, liminality, imagined geographies, space-time and spatio-legal constructs.

A. Charting the Course

Growing interest in understanding how spatial perspectives⁷³ have the tendency to distort or conceal relationships of power within social, political, and economic life, has given rise to a body of literature that has collectively been referred to as reflecting a 'spatial turn' in the social sciences. In their view, collective action is conditioned by the spatial context and constitution of these various processes. In the first part of this chapter I investigate this 'spatial turn' in the

⁷¹ What Thomas Osborne refers to as a 'macho constructivist view'. See, Thomas Osborne, "Constructionism, Authority, and the Ethical Life," in *The Politics of Constructionism*, ed. Irving Velody and Robin Williams (London: Sage, 1998), p 232.

⁷² Tuomas Forsberg, "The Ground without Foundation? Territory as a Social Construct," *Geopolitics* 8, no. 2 (2003): p 8.

⁷³ By which I mean perspectives about the activities that occur in space and thus have, attached to them, properties like location, distance, and orientation.

social sciences, particularly within the discipline of critical sociology and human geography, to examine the politics of space. In the second part of this chapter I investigate this 'spatial turn' as it applies to legal discourse, critically analysing the work of legal geographers to highlight how law works to construct and naturalise models of space and what effects this has on the ordering of social and political life. I also raise some prominent critiques about spatial research in the social sciences, and elaborate how this thesis works to fill the gaps and oversights in the existing literature.

This thesis emerges out of an analysis of the two parts of this chapter, in that it adopts the view that meaningful spatial critique involves not only studying the "actual locations, extensions, and patterns of things", but also "how these are described and conceived of in different social and intellectual perspectives."⁷⁴ Models of space have a material and cognitive component. The same spatial context has the potential to be interpreted differently across societies, giving rise to diverging, and often competing, visions of social ordering and regulation. To study space, therefore, is to study how groups understand their relationship to one another and how they construct and maintain their sense of self. My aim in this analysis is to expose and give voice to contested, and often silenced, forms of spatial meaning. Despite their absence in dominant spatial and legal discourse, however, contested views of space are equally involved in exercises of solidarity-building and identity-making. Accordingly, their exposure is of value in assessing how communities that have been silenced by being located, contained, and excluded in and through dominant conceptions of space, can nonetheless use space as a site of resistance and cultural expression.

2. The Politics of Space

Social processes occur in space and over time, meaning that they can be spatially and historically located. While social scientists have long been intrigued by the socially-constructed nature of time as a category of analysis, the same level of scrutiny has, until very recently, rarely been devoted to the work of space. It was Foucault who largely inspired the spatial turn in the social sciences in claiming that the twentieth century was "the epoch of simultaneity: we are in the epoch of juxtaposition, the epoch of the near and far, of the side-by-side of the dispersed."⁷⁵ Foucault imagined space as a potential paradigm for assessing and evaluating human trajectories, and saw the over-emphasis on the temporal contextualisation of social life as

⁷⁴ Robert David Sack, *Human Territoriality: Its Theory and History* (Cambridge: Cambridge University Press, 1986), p 25.

⁷⁵ Michel Foucault and Jay Miskowiec, "Of Other Spaces," *Diatrics* 16, no. 1 (1986): p 22.

having consistently marginalised the importance of geography to social theory. Socio-spatial theorists building on Foucault's initial instincts argued that the 'spatial' cannot be properly separated from the 'social' and express scepticism towards claims which are resilient to or evade the spatial nature of social processes.

The most dominant theories of space can be categorised along two, frequently overlapping, trajectories. Literature that adopts a *power view* of space, discuss space as an instrument of ideological, cultural, and political power and domination. This curve of spatial analysis can be identified in Foucault's writing, but also the work of urban geographers such as Henri Lefebvre and Edward Soja, political geographers such as John Agnew and David Harvey, and literary theorists such as Edward Said and Benedict Anderson. A second set of literature adopts a *relational view* of space. This literature connects the making of space to social relations more broadly, and discusses relational and corporeal aspects of space and spatial experience. We find evidence of this relational view of space within Merleau-Ponty's writing, the work of human geographers such as Doreen Massey, the body of writing produced by non-representational theorists, sociological researchers such as Sherene Razack, and legal geographers such as David Gregory, Nicholas Blomley, and David Delaney. There is significant overlap between these two trajectories, particularly when these authors discuss the link between space and identity. While I discuss both streams separately, the thesis often draws on the intersections and overlaps between these two bodies of literature.

A. The Power View of Space

Significant interest in spatial analysis emerged in the early 1960s, finding its voice within the postmodern project of critical social theorists. Critical theorists adopting the power view of space argued that for much too long history had commanded the social imagination to the detriment of geography. As Soja asserts, "[a]n already made geography sets the stage, while the wilful *making* of history dictates the action and defines the storyline."⁷⁶ While human societies were perceived as active participants in the making of history, geography appeared as a relatively stable and pre-political complement of the social imagination. Yet, for most social theorists writing with the aim of provoking an intellectual turn towards space, life stories could not only be told as narratives of history, but as geographies as well. This realisation caused some commentators to remark that the trajectories of human existence "have a milieu, immediate locales, provocative emplacements which effect thought and action."⁷⁷ They argued

⁷⁶ Edward W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989), p 14.

⁷⁷ Ibid.

that if the aim of critical social theory was to reveal new sites for mounting emancipatory challenges then space and geography needed to be taken more seriously.

Despite this early segue into politicising space, it is not until the early 1970s that we can identify a distinct and fundamental shift in favour of theorising space as a socio-political construct – what we now refer to as the ‘spatial turn’ - and it was Foucault’s work on space and power that sparked this renewed interest. Though typically referred to as a historian, Foucault’s preoccupation with spatial tendencies was reflected early on in his writing in *Madness and Civilisation* (1961), and was a preoccupation that intensified in his later work in the *History of Sexuality* (1978).⁷⁸ Rejecting social theory’s fetishisation of historicity and its monopolisation of the nature of critical contextualisation and interpretation, Foucault claimed that:

[t]he great obsession of the nineteenth century was, as we know, history: with its themes of development and of suspension, of crisis and cycle, themes of the ever-accumulating past, with its great preponderance of dead mean and the menacing glaciations of the world.⁷⁹

Foucault’s work connected spatial analysis to exercises of power and the organisation of knowledge, particularly within the context of surveillance and governmentality.⁸⁰ However, the subtlety with which spatiality is interwoven into his analysis of power has caused some commentators to remark that spatial analysis signaled a glaring ‘blindspot’ in Foucauldian philosophy.⁸¹ Despite its definitional vagueness, it is certain that the category of space occupied an important position in Foucault’s work, particularly in how he analysed structures of domination through techniques of routinisation and how they worked to construct disciplinary spaces.⁸² His fascination with the spatialisation of power embraced an awareness of the immaterial and imagined nature of spatiality. This significantly challenged the prevailing geographical discourse which had, until then, perceived geographic space as the physical and

⁷⁸ Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (New York: Random House Digital, Inc., 1988). Also see, ———, *The History of Sexuality, Vol.1: An Introduction*, trans. Robert Hurley (New York: Random House, 1978).

⁷⁹ Michel Foucault and Jay Miskowicz, "Of Other Spaces," *Diatrics* 16, no. 1 (1986): p 22.

⁸⁰ Felix Driver, "Power, Space and the Body: A Critical Assessment of Foucault's Discipline and Punish," *Environment and Planning D: Society and Space* 3(1985). Also see, Chris Philo, "Accumulating Populations: Bodies, Institutions, and Space," *International Journal of Population Geography* 7, no. 6 (2001).

⁸¹ Nigel Thrift, "Overcome by Space: Reworking Foucault," in *Space, Knowledge and Power: Foucault and Geography*, ed. Stuart Elden and Jeremy W. Crampton (Hampshire, England: Ashgate, 2007).

⁸² Michel Foucault, "Some Questions from Michel Foucault to Herodote," in *Space, Knowledge and Power: Foucault and Geography*, ed. Stuart Elden and Jeremy W. Crampton (Hampshire, England: Ashgate, 2007). Also see, sAndrzej J.L. Zieleniec, *Space and Social Theory* (London: Sage, 2007), p 125-49.

natural environment in which social life unfolds.⁸³ Criticising social theory's blindness to the political, contingent, and active nature of space, Foucault's work has been indispensable for drawing attention to how space operated to *contain* social relations by organising, dividing, and disciplining human populations. Constructions of space therefore became the product of relationships of power.

B. 'Spacing' Time

The critical social sciences have, till very recently, preserved the very "privileged place for the 'historical imagination' in defining the very nature of critical insight and interpretation."⁸⁴ While this analysis provided much information about changes in social and political structures and interactions, the 'progressive' stance of history meant that structures and interactions had to be located in linear terms, and analysed through the use of temporal hierarchies. Historical trajectories were frequently understood through the linear tropes of progressiveness and primitiveness. This meant that social institutions (including legal and political structures) were often examined by placing them along one fixed historical trajectory, typically structured by Anglo-European timelines.

The relationship between history and geography has been a salient feature of contemporary socio-spatial literature, and some authors have gone as far as to refer to time as the 'counterpart' of history.⁸⁵ Others have described time as being 'spaced',⁸⁶ in the sense that the abstract domain of time appears to acquire its relational structure from human experiences of the more concrete domain of space.⁸⁷ This idea resonates with the ideas presented in this thesis, particularly when I discuss how political and legal geographies, like the Reservation represent spaces that have been temporalised, imagined to exist 'back in time'.

⁸³ Michel Foucault and Jay Miskowicz, "Of Other Spaces," *Diatrics* 16, no. 1 (1986): p 23. This is illustrated quite vividly through his notion of heterotopia – spaces composed of both the produced spaces of 'sites' and their attendant social relations; a space that is both concrete (composed of the material environment) and abstract (having a meaning that could not be attributed to the physical features themselves and tended to vary across different societies). This concept appeared to draw inspiration from Chombart de Luawe's distinction between objective and subjective social space. See, Anne Buttimer, "Social Space in Interdisciplinary Perspective," *Geographical Review* 59, no. 3 (1969): p 418. As Buttimer notes, "[i]n many cases objective and subjective 'spaces' failed to coincide – subjective spaces reflecting values, aspirations, and cultural traditions that consciously or unconsciously distorted the objective dimensions of the environment."

⁸⁴ Edward W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989), 10, 15. The folding of time into spaces symbolises, for Soja, "an overdeveloped historical contextualisation of social life and social theory that actively submerges and peripheralises the geographical or spatial imagination."

⁸⁵ D. Harvey, *The Condition of Postmodernity* (Oxford: Blackwell, 1989). Also see, Anthony Giddens, *The Constitution of Society: Introduction of the Theory of Structuration* (Los Angeles: Univ of California Press, 1984).

⁸⁶ Edward W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989).

⁸⁷ Concrete in the sense of human sensory experience; people experience space through their senses in ways that the can never experience time. Lera Boroditsky, "Metaphoric Structuring: Understanding Time through Spatial Metaphors," *Cognition* 75, no. 1 (2000).

Building on this relationship between space and time, theorists like Merleau-Ponty have pointed to the human body as a possible 'bridge' between these two categories of analysis, claiming that human experience of objects in space is invariably linked to time because to *locate* or to *see* imposes temporal constraints on the object that is being observed. To say that an object 'exists' means to say that it 'exists at the same time as I exist'; it is to confirm "that simultaneity is the very meaning of perception belonging to the same temporal wave."⁸⁸ In perceiving objects we always draw on the elements of space *and* time, though often, we are more acutely aware of one over the other. This means that, if time remains active within our perception, space becomes static and passive (and vice versa). Space, therefore, becomes significant because it *fixes* a particular meaning of time, so much so that this meaning of time in space (the spatio-temporal or the 'space-time') comes to stand in for space itself.⁸⁹

This idea of corporeal emplacement and the recognition of simultaneity of corporeal existence is an interesting one, particularly as it informs interactions that I highlight throughout this thesis. While the act of observation is often understood as placing temporal and spatial restraints on the observed object (i.e. I *know* the object exists at the same time and in the same space as I do because I can *see* it), my analysis in Chapter Three and Four suggests that imagined geographies often work to *displace* that recognition of simultaneity. For example, in Chapter Four I consider how the Tribal Areas are understood by the State of Pakistan as a regressive geography, of a space fixed in time long ago, and that is despite the fact that the Pakhtun community most certainly exists in the here and now, because they are *visible* and *perceptible* beings.

The distortion of reality that the Pakhtun example highlights may be explained by the work of authors that draw attention to how it is not the *very act of perception* that becomes important to the relationship of space to time, but how the perceived object or phenomena *relates* to one's perception. Thus, perceptions of objects or phenomena can be described as *relative*, in that our attachment of the features of space and time are subjective – in relation to *ourselves* – and a perceived object has the possibility of being interpreted differently when perceived by different people. Objects, phenomena, and events experienced or perceived in space are frequently made sense of through their positioning within, what Massey refers to as, an 'historical queue'. We relate simultaneously co-existing events, things and phenomena in relation to their (perceived)

⁸⁸ Maurice Merleau-Ponty, *Phenomenology of Perception*, trans. Colin Smith (Delhi: Shri Jainendra Press, 1996), p 265.

⁸⁹ As Massey notes, "[t]here is an idea with such a long and illustrious history that it has come to acquire the status of an unquestioned nostrum: this is the idea that there is an association between the spatial and the fixation of meaning. Representation – indeed conceptualisation – has been conceived of as spatialisation...Moreover, though the reference is to 'spatialisation', there is in all cases slippage; it is not just that representation is equated with spatialisation but that the characteristics derived have come to be attributed to space itself." See, Doreen Massey, *For Space* (London: Sage, 2005), p 20.

appearance in time. People understand some events as occurring *before* others, and certain things as emerging *after* other things. Our perceptions of objects in space are continuously conditioned by our conception of time. This allows us to relate events, objects, and phenomena by placing them before or after each other, and thus making some sort of decision – however rudimentary it may be – about their relative ‘progressiveness’ and ‘stagnancy’ (or simplicity and complexity) in relation to one another.⁹⁰ We are thus, able to compare two objects or phenomena by locating them in relation to each other in space and in time.

More importantly, in comparing similarly situated objects and phenomena we make moral decisions about them. These are relational moral decisions – we attach moral judgments based on how they compare to other objects within our comparator group. For example, in locating all social communities through the space of geography allows us to compare the ways in which they have used their landscape and environment. We can then make judgments about some social communities having made *better use* of their land and some having made *poorer use* of their land. These decisions then become important for determining the moral worth of a community as ‘modern’ and ‘progressive’ or ‘traditional’ and ‘primitive’. Geography, in this instance, is made to exist as a ‘neutral’ background within which these determinations can take place. However, as Merleau-Ponty argues, “any movement to focus on an object inevitably results in the clos[ing] up of the landscape and the opening of the object...” we tend to see “our surroundings vaguely in order to see the object clearly.”⁹¹ In stabilising geography as the primary medium through which interaction takes place, we foreclose the potential of other landscapes of analysis. Thus, in our preoccupation with *time* as the primary category of analysis throughout much of the last half century, the politics of space has remained largely invisible in our appraisals of relationships, events, and objects.

Thus, in Chapter Five, when I suggest the idea of coeval recognition, the recognition of simultaneous existence in space and time, a crucial step in pursuing forms of coeval recognition is that societies accept the potential of multiple simultaneous historical trajectories as well. Contemporary societies need to acknowledge and accept that their histories are not the *only histories*, and so coeval recognition requires processes which give voice to competing histories that unfold in shared spaces. Furthermore, Merleau-Ponty’s focus on the body as an active agent in doing and experiencing space, further underwrites my idea of both Occidental Legality and coeval recognition precisely because, while the former is interested in locating and containing

⁹⁰ Barney Warf and Santa Arias, "Introduction: The Reinsertion of Space in the Humanities and Social Sciences," in *The Spatial Turn: Interdisciplinary Perspectives*, ed. Barney Warf and Santa Arias (Abingdon, Oxon: Routledge, 2008), p 2.

⁹¹ Maurice Merleau-Ponty, *Phenomenology of Perception*, trans. Colin Smith (Delhi: Shri Jainendra Press, 1996), p 67.

the native body (in order to maintain distance between the native and settler), a realisation and awareness of the *plasticity of the human body*,⁹² and the body as a modality of protest, becomes crucial for coeval recognition

While the social sciences are becoming more interested in examining historical analysis to reveal new contingencies that previously evaded researchers too focussed on time, there is the argument that what is really necessary in this 'backtracking' of history, is that we understand the relationality of space and time. Geographic or spatial analysis need not be 'anti-history'. Foucault suggests that the opening up of the spatial field should be seen as an opportunity to spatialise history – to produce a historical narrative that takes into account the social production of space in order to create a 'historical geography'.⁹³ For example, in Chapter Three I discuss how unconventional or divergent conceptions of space and geography have an influence on the forms and types of political and legal relationships that emerge as two distinct normative communities come into contact with each other. As such, these histories and landscapes of analysis have implications for one another. In using the methods of historical literary analysis, this thesis builds on Foucault's idea of historical geography to study the imaginative, legal, and political manifestations of space as owned, possessed, and culturally-divisible.

The very act of defining, delimiting, and giving meaning to space imposes limits on it. The modern tendency to see space as discontinuous and fragmented can partially be attributed to the time-space compression that characterised the Industrial Revolution. In this thesis I refer specifically to how this tendency emerged as a result of European overseas technologies and the fact that once isolated and invisible communities were suddenly perceptible and near. The 'spatial turn' in the arts and sciences draws particular attention to how many of the stable categories of space and time are produced through "single-voiced narratives" and thus have the effect of minimising the fact that "position and context are centrally and inescapably implicated in all constructions of knowledge."⁹⁴

⁹² I borrow the term of Brenna Bhandar's work. But the idea of the body as 'plastic', as given meaning through cultural inscriptions, from which the body itself is indistinguishable, can be found in the work of Judith Butler. However, Bhandar and Foucault adopt the idea that there exists a pre-inscriptive body, and that the body's potential for agency can allow it to act in ways that transgress the cultural labels that have been mapped upon it. See, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), p 8. Also see, Michel Foucault, ed. *Neitzsche, Genealogy, History*, The Foucault Reader (New York: Random House, 1984), p 83. Also see, Brenna Bhandar, "Plasticity and Post-Colonial Recognition: 'Owning, Knowing, and Being'," *Law Critique* 22(2011).

⁹³ Michel Foucault and Jay Miskowicz, "Of Other Spaces," *Diatrics* 16, no. 1 (1986).

⁹⁴ Denis Cosgrove, "Introduction: Mapping Meaning," in *Mappings*, ed. Denis Cosgrove (London: Reaktion Books, 1999), p 7.

However, the location of people in different time-spaces is not something that simply *happens*. It is a political project and Lefebvre, who I discuss in the section below, addresses this political aspect of space. People and phenomena are located in separate and competing time-spaces to make comparison unnecessary or impractical. For example, the division of the world's geography into the hemispheric divisions of 'East' and 'West' is one such political project. But I discuss several others like the Tribal Areas, the Aboriginal Reservation, and the national parklands as other time-spaces that, in many ways, minimise the fact that these geographies are manifestations of jurisdictional struggle; the struggle between communities to have their right to exercise political and legal power recognised. These geographies operate to minimise the moral equivalence of native political and legal regimes and institutions, and portray competing normative communities as incommensurable. This allows for the creation of distance even under conditions of close proximity. For instance, if we look at Pakistani case-law, particularly within the context of constitutional law, it is possible to find frequent mention of Rawlsian and Kelsenian equality principles. Despite a long, rich, legal tradition – composed of tribal law, Hindu laws, and the *Shariat* – that prevailed in India before the arrival of the Europeans, many Pakistani courts draw on European philosophical traditions in adjudicating fundamental rights cases.⁹⁵ In Chapter Four, I discuss how postcolonial Pakistan, as a prototypical 'Eastern' society, seems to define itself as entirely originating from the colonial experience; it sees itself as an extension of Europe. Thus, despite the fact that Pakistani society has a long history of tribalism and ethnic factionalism, the co-existing tribal communities within the *shared* geographic space of the new State are very clearly perceived as 'Eastern' – primitive and belonging to a different time (back in time), a different space. They are perceived as not having *modernised* like the rest of the State. The positioning of tribal and kinship communities in separate spaces and historical moments than the rest of the State renders the two incomparable by giving the illusion of a fragmented, non-converging, and uncommon history.

C. Lefebvrian Space and Space as a Political 'Strategy'

While Foucault can be credited with ushering space to the forefront of social science critique, Henri Lefebvre was essential for inspiring views of space as an integral *tool* or strategy of political enterprise. In his pioneering book, *The Production of Space*, Lefebvre argues that space is political and that geography, as a specific spatial representation must be thought of as reflecting very specific interests and objectives. Space is a discourse of power that has taken on:

a reality of its own, a reality clearly distinct from, yet much like, those assumed in the same global processes of commodities, money and capital...it serves as a tool of thought and

⁹⁵ T. K. K. Iyer, "Constitutional Law in Pakistan: Kelsen in the Courts," *The American Journal of Comparative Law* 21, no. 4 (1973).

action; that in addition to being a means of production it is also a means of control and hence domination...[and this is a reality of space that] escapes in part from those who would make use of it.⁹⁶

According to Lefebvre, spatial analysis should therefore seek to study the techniques that have been employed to produce a given space and must also include an appraisal of its “contents, that is the contents which resist form or strategy: namely its users.”⁹⁷

Using a dialectical method of analysis, Lefebvre designs a view of space similar to Foucault, in that it incorporates both the formal and relational (or objective and subjective) properties of spatial formations.⁹⁸ Space becomes politicised precisely because there are multiple, and sometimes conflicting, ways of imagining it, constructing it, and dominating or mastering it.⁹⁹ Strategies used to maintain a given production of space over time rests on the orientation, authority, and ideological power of its strategists. Lefebvre’s work, therefore, draws attention to the inter-discursive production of space; space as geographies, underwritten by, for example, political and legal discourse. His work examines how these discursive strategies *naturalise* space. He argues that by linking political projects (like urban planning) to science and the natural environment gives space a “natural character...Space passes as being innocent, or in other words, as not being political.”¹⁰⁰

Like Foucault, Lefebvre refers to how power relationships underpin spatial productions, arguing that, apart from the formal and institutional apparatuses of power that produce and circulate their vision of space, the people whose lives and interactions are controlled through a particular spatial form also have tremendous influence over its staying power.¹⁰¹ The value and power of a particular spatial form comes from a consensus in meaning between its users, who must see a given production of space as essential, inevitable, or impossible to overthrow. Spatial forms must, therefore, be produced and reproduced through social interaction, and these interactions have tremendous potential to both sustain and destroy certain views and constructions of space. I illustrate this idea in Chapter Three and my discussion of Aboriginal

⁹⁶ Henri Lefebvre, *The Production of Space*, trans. Donald Nicholson-Smith (Oxford, UK: Blackwell, 1991), p 26.

⁹⁷ ———, ed. *State, Space, World* (Minneapolis: University of Minneapolis, 2009), p 171.

⁹⁸ Indeed we see this subject/objective notion of space pop up in the writing of many social theorists, including David Harvey who replaces the binary division with the triad of absolute, relative, and relational space. Arguing that absolute is space as a ‘thing in itself’ (e.g. Newtonian space), relative space is a space defined as a “relationship between objects which exists only because objects exist and relate to each other”, and relational space are spaces produced in terms of one another. See, David Harvey, “Space as a Key Word,” in *Marx and Philosophy Conference* (Institute of Education, London 2004).

⁹⁹ Henri Lefebvre, ed. *State, Space, World* (Minneapolis: University of Minneapolis, 2009), p 172.

¹⁰⁰ *Ibid.*, p 168.

¹⁰¹ See, for instance, Lefebvre’s discussion of the State as the ‘centre of spatial discourse’, in which the modern State emerges, in the Hegelian sense, as both the end and meaning of history. As the pre-eminent spatial form, the State entirely obliterates eliminates – ‘crushes’ – the meaning and passage of time. See, *The Production of Space*, p 23.

title jurisprudence, where native communities accept and reproduce a territorial vision of space in making claims for autonomy and greater self-governing powers.

As we speak of the concept of territory over the course of this thesis, the Lefebvrian conception of space is materialised through the various power relations that give space specific meaning – essentially space that is bounded, possessed and culturally-divisible. These can include material markers such as borders and boundaries, but also intellectual ones like jurisdiction. This can also include cultural geographies like the Reserve and the national parklands. Space becomes an artefact of the exercise of power precisely because it can be used to ‘contain’, exclude, and define Others.

D. The *Relational View* of Space and Socialising the Spatial Form

Lefebvrian space is strategic; space emerges through the process of putting certain interests to work; it is both the product and driver of socio-cultural and political practice. For authors drawing on Lefebvre’s work the idea of space as a strategy has, in turn, provoked curiosity about the possibility of *socialising* the spatial form; the idea that space can be interpreted as a *social relation* and that the stability of any spatial form relies on its enactment and re-enactment by human communities. Apart from corresponding to some grand institutional design of social and political ordering, space can be understood in terms of micro-level actions that can be examined as expressions of self-identity and products of perceived social difference (e.g. racialised spaces, cultural spaces).

This ‘relational’ view of space has recently been drawn on in the work of researchers within the discipline of geography in advancing two important ideas. The first is how institutionalised spaces – territory, the prison, the clinic, the school – are underwritten by a series of smaller-scale social practices and social rules that either affirm or refute (or resist) the dominant conceptions of space. Often, different communities will have different criteria for determining the rules that govern access to a location and its contents. Competing rules will give rise to competing spatialities which may be determined in relation to one another, or in defiance of one another. The dialogical process which gives rise to constructions of space can thus be said to produce contested activities *in space*; different ways of *doing* or performing space based on competing perceptions of geographies that have been produced. From this perspective, the focus of spatial analysis becomes social practice, highlighting human agency and how societies fix certain ways of seeing and experiencing land and the natural environment. For example, some authors highlight how Aboriginal communities perceive land as sacred to their sense of self and thus industrial development is perceived as offending this relationship that they have

with the land.¹⁰² At the same time European voyagers, as I argue in Chapter Two, perceived a lack of development and infrastructure as wasteful.

The second idea that relational theories of space draw attention to is how societies construct 'place' out of space. In other words, they are interested in investigating the sorts of practices people engage in to personalise their immediate environment and what may be some of the underlying motivations for their doing so. The focal point of spatial analysis, in this case, becomes the relationship between spatialisation (certain representations or constructions of space) and identity-formation. I address this idea further in section (2)(i) below.

Conceptions of 'space as a relation' are most eloquently theorised in Massey's *For Space*, where she argues that relational thinking requires us to redefine space according to three new strands in spatial thinking.¹⁰³ First, space needs to be seen as emerging from networked social interactions. Space becomes a "product of interrelations."¹⁰⁴ Secondly, multiplicity or 'co-existent heterogeneity' should be understood as an intrinsic feature of space. And third, coalescence between these spatialities is an open process; spatialities are continuously being negotiated and renegotiated; space is constantly evolving and in the process of *becoming*.¹⁰⁵ Central to her design of spatial analysis is the importance of *process* rather than *product*.¹⁰⁶ Massey echoes other critical theorists in speaking to the co-existing heterogeneity (and future potentialities) of a thoroughly disordered¹⁰⁷ and non-essentialist view of space and suggests that we imagine space as "a simultaneity of stories-so-far."¹⁰⁸ Putting forth a spatial perspective centred on restoring the value of human agency and the ability of human communities to be masters of their destiny, Massey's view of space informs my discussion on hybrid geographies and coeval recognition, where I argue for a continuously open idea of space that takes seriously the human capacity for action. Using her work, I challenge liberal discourse and its assumption that the Reservation is a sufficient guarantee for recognition and diversity. I do this by examining how the Reservation forecloses opportunities for dialogue and places too much

¹⁰² Bruce Rigsby, "Aboriginal People, Spirituality and the Traditional Ownership of Land," *International Journal of Social Economics* 26, no. 7/8/9 (1999): p 964-5.

¹⁰³ Doreen Massey, *For Space* (London: Sage, 2005), p 9-11.

¹⁰⁴ Ibid., 9-11. This idea of inconnectivity also finds resonance within Thrift's work, whereby he argues that we can no longer see space as a 'nested hierarchy'. Instead, the new focus of spatial studies should be the interconnections between spaces. See, N Thrift, "Intensities of Feeling: Towards a Spatial Politics of Affect," *Geografiska Annaler: Series B* 86(2004): p 59.

¹⁰⁵ An idea that appears to borrow from Deleuzian views of space in which spatialities are understood more as interconnections, and "conceptual assemblages" rather than "applications." Charles J Stivale, "Introduction: Actuality and Concepts," *Sub Stance: a Review of Theory and Literary Criticism* 20, no. 3 (1991): p 9.

¹⁰⁶ David Harvey, "Space as a Key Word," in *Marx and Philosophy Conference* (Institute of Education, London 2004).

¹⁰⁷ A view of space that has been particularly salient in the work of Andreas Philippopoulos-Mihalopoulos. See, Andreas Philippopoulos-Mihalopoulos, "Law's Spatial Turn: Geography, Justice and a Certain Fear of Space," *Law, Culture and Humanities* 7, no. 2 (2011).

¹⁰⁸ Doreen Massey, *For Space* (London: Sage, 2005), p 9.

importance on the 'product' of recognition, rather than the *process* of interrelations that produce these legal geographies.

i. ***Making Spaces into 'Places'***

The implication that geographies are socially constructed has sociologists and geographers reflecting on how we 'invent' places. In better conceptualising alternating and competing visions of space, theorists have referred to the process of organising and representing space as place-making.

A place is a unique spot in the universe. Place is the distinction between here and there, and it is what allows people to appreciate near and far. Places have finitude, but they nest logically because the boundaries are (analytically and phenomenologically) elastic.¹⁰⁹

Place always involves 'appropriation and transformation of space and nature that is inseparable from the reproduction and transformation of society in time and space.'¹¹⁰

Places, as "constellations of 'culturally-specific ideas' about the world and lived experiences of being embodied in it",¹¹¹ emerge as a result of people's "social, material, and semiotic investments in their immediate environment."¹¹² As a result, places – as particular constructions of space – are reflective of a community or individual's sense of self, and their perceived relationship to people, things, and relationships around them.¹¹³ Places become particular orderings of our environment,¹¹⁴ which "determine to a large extent the space of agency and the mode of participation in which we act as citizens in a multi-layered politics to which we belong."¹¹⁵ Consequently, places become integral for not only how we perceive others, but also how we express ourselves and, for that reason, they are underwritten by rules that define 'normal' versus 'transgressive' behaviours and activities. In Chapter Two I discuss how constructed places are structured and defended through, for example, markers of possession (i.e. constructing fences, marking of boundaries, and building homes as expressions of an intent to remain that reflect ideas of ownership). From this analysis it is possible to argue that

¹⁰⁹ Thomas F Gieryn, "A Space for Place in Sociology," *Annual review of sociology* (2000): p 463.

¹¹⁰ Setha M. Low and Denise Lawrence-Zuniga, eds., *The Anthropology of Space & Place: Locating Culture* (Oxford: Blackwell Publishing, 2003), p 5.

¹¹¹ Alex Kostogriz, "Putting" Space" on the Agenda of Sociocultural Research," *Mind, culture, and activity* 13, no. 3 (2006): p 177.

¹¹² Ibid.

¹¹³ Anssi Paasi, "Bounded Spaces in the Mobile World: Deconstructing 'Regional Identity'," *Tijdschrift voor economische en sociale geografie* 93, no. 2 (2002): p 139.

¹¹⁴ Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis: Minnesota University Press, 1977), p 5-6.

¹¹⁵ N Yuval-Davis, "National Space and Collective Identities: Borders, Boundaries, Citizenship and Gender Relations" (paper presented at the Inaugural Lecture, University of Greenwich, 1997). As quoted in, Anssi Paasi, "Bounded Spaces in the Mobile World: Deconstructing 'Regional Identity'," *Tijdschrift voor economische en sociale geografie* 93, no. 2 (2002): p 139.

'territory' was a specific 'place-making' strategy of European settlers and voyagers that has taken on a universal character. As a place-making strategy, therefore, territoriality is bound to be exclusive, as it encodes space with the European cultural symbols, signs, and markers.

Place-making has an important function. It reduces the anxieties that people feel about the unfamiliar and open environment by mapping that environment with ideas, institutions, and practices that are familiar.¹¹⁶ Massey notes that place-making evolves from perceptions of threat and alienation and that places thus provide communities with a secure hideaway from "new invasions...a locus of denial, of attempted withdrawal from invasion/difference."¹¹⁷ In Chapter Two and Three I consider how the imaginative geographies produced out of the Imperial-Indigenous encounters were mainly the product of European anxieties, brought on by the proximity of White and native bodies, and the fact that the environments that they were encountering were new and strange. The reproduction of these imaginative geographies through maps and in journal-writing, and later their institutionalisation through legal and political processes, were all part of the process of European place-making in new environments.

Yet, places are not only spaces of comfort and protection. They can also become spaces of confinement.¹¹⁸ Thus, place-making has both an exclusionary and inclusionary aspect,¹¹⁹ which often involves directing our gaze as much *outward* as *inward*. This is why places constructed at different "spatial scales may be stacked, overlapped, or nested, sometimes by design...sometimes more haphazardly as overlapping and even competing jurisdictions..."¹²⁰ The durability of a 'place' is contingent on the degree to which it is able to procure both internal as well as external acceptance. Place, then, precipitates from social experiences of space, and thus space and place have been conceived by theorists like Relph as dialectically structured within the domain of human environmental experience.¹²¹

¹¹⁶ Tuan remarks that space as the abstract, the unknown, undifferentiated "becomes place as we get to know it better and endow it with value." , Space and place are aspects of one another and it is from the "security and stability of place" that we become more attuned to the "openness, freedom, and threat of space, and vice versa." Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis: Minnesota University Press, 1977). ———, *Space and Place: The Perspective of Experience* (Minneapolis: Minnesota University Press, 1977), p 6.

¹¹⁷ Doreen Massey, *For Space* (London: Sage, 2005), p 5.

¹¹⁸ One could argue that in construing domestic space or private space (in the legal sense) we are limiting women's access to certain resources and relationships (e.g. paid work, or political life). Or, that the reservation impedes people's access to certain social goods (i.e. healthcare, education) and kinds of interactions.

¹¹⁹ The inclusionary element being referred to by proponents of place-making as ways in which vulnerable groups are able to 'protect their patch'. See, Doreen Massey, *For Space* (London: Sage, 2005), p 6..

¹²⁰ Ann R Tickamyer, "Space Matters! Spatial Inequality in Future Sociology," *Contemporary Sociology* 29, no. 6 (2000): p 276.

¹²¹ Edward Relph, *Place and Placelessness* (London: Pion, 1976).

ii. 'Performing Space'

The grounding of the body in space, to speak of space in terms of corporeal emplacement, has been explored by a variety of phenomenological theorists who believe that the body acts as a bridge between personal and physical identity and gives rise to the idea that place, the space in which the body is situated,¹²² should be considered "constitutive of one's sense of self."¹²³ Some theorists have suggested that the body may act as a medium through which time is materialised in space, arguing that the abstract conceptual domain of time is organised through our sensory perception of the 'more concrete' domain of space.¹²⁴ Thus, the human body fixes and reifies space as a way of conceptualising the passage of time. As space becomes inert, organic, and concrete, time becomes active, evolving, and disorderly. Clearly there is the counter-argument that our sensory perceptions of space are themselves conditioned by already internalised models of spatiality (representations of space) and unequal distributions of power. Yet, perhaps that is precisely the point that theorists like Boroditsky and Tuan assert; that in our concretisation of space these histories of asymmetrical power relations become *less visible*, less perceptible.

But the reverse relationship may also be true, that stabilising spaces help reify and immobilise the body. For example, in producing the political and legal geographies of the national parkland and the Reserve, societies are able to, in the first instance, displace native presence from sacred common spaces like the park, and in the second instance, remove native presence from mainstream spaces to contain and immobilise them within the Reservation. In Chapter Three I explore this idea further to argue that place-making strategies often make social difference more visible to us in some cases (i.e. the Reservation), and less visible to us in others (i.e. the protected areas of parkland).

¹²² Tuan, for instance, argues that our sensory perception of space has a profound role to play in "enriching our apprehension of the world's spatial and geometrical character." Interesting, using the same rationale as Boroditsky, but approaching space as a domain in need of concretising, he argues that our bodily senses are a concrete dimension of the more abstract domain of space. Our sense of sight, smell, and taste are what provide us with the metaphorical language to understand and organise our spatial environment. See, Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis: Minnesota University Press, 1977), p 12-3. Lera Boroditsky, "Metaphoric Structuring: Understanding Time through Spatial Metaphors," *Cognition* 75, no. 1 (2000). Spatial analysis focusing on the idea of 'affect' tries to determine what emotions and feelings are inspired by various performances or ways of 'doing space'. Beyes and Steyaert remark that performances of space are emotional, in the sense that "social fabrics and practices are not locked in to rational or predictable logics, and often are visceral and instinctive." See, Timon Beyes and Chris Steyaert, "Spacing Organisation: Non-Representational Theory and Performing Organisational Space," *Organisation* 19, no. 1 (2011): p 52. Also see, Maurice Merleau-Ponty, *Phenomenology of Perception*, trans. Colin Smith (Delhi: Shri Jainendra Press, 1996), p 207-99. This work on body and corporeal emplacement is also consonant with Lefebvre's work, in which he notes that our "understanding of space...must begin with the lived and the body, that is, from a space occupied by an organic, living, and thinking being." H. Lefebvre, "Space and the State," in *Henri Lefebvre: Space, Space, World: Selected Essays*, ed. N. Brenner and Stuart Elden (Minneapolis, MN: University of Minnesota Press, 2009), p 229.

¹²³ Edward S. Casey, "Between Geography and Philosophy: What Does It Mean to Be in the Place-World?," *Annals of the Association of American Geographers* 91, no. 4 (2001): p 684.

¹²⁴ Lera Boroditsky, "Metaphoric Structuring: Understanding Time through Spatial Metaphors," *Cognition* 75, no. 1 (2000).

This, however, does not mean that the native body has no agency to resist and counteract these processes of place-making. For example, a range of theorists have discussed the possibility of viewing space as a *performance* of continuous enactment and re-enactment. Authors speaking of spatial performativity focus less on discursive and non-subjective constructions of space and spatial identities, and instead interpret space through subject-driven processes. These theories focus on the idea of how human communities *do space*.¹²⁵ Gregory puts forth a design for spatial analysis that considers space to be “as much a *repertoire* as it is an archive.”¹²⁶ One of the ways in which native communities *do* the Reservation is by, for example, continuing to engage in legal processes by adopting a territorial vision of space in which exclusive access to space equates to autonomy. In mobilising the discourse of territory through these processes they reproduce the Reserve as an owned, possessed, and culturally-divisible geography. In this way spatial performances can be understood as enactments of power,¹²⁷ and have sometimes been declared critical to the communication of cultural politics.¹²⁸

iii. *Place-Making and the Natural Environment*

Many studies of the relationship between space and identity argue that the material features of an environment play an important role in how we understanding self- and group-identity. Landscapes – different combinations of the visible physical features of a section of land, its climatic conditions, overlaid with the cultural elements of human presence – have been described as an important component of human identity. The structures and buildings that are erected and the methods of land-use that are adopted are visible markers of transforming one’s space into place. Human societies associate their development of space - the ways in which space responds to, encompasses, or resists the natural features and conditions of the environment - as essential to their understanding of self. In some instances, elements of the natural environment are imagined as linked with the particular history of a social or political community. For instance, Storey describes how the remote, mountainous region of the Canadian

¹²⁵ Timon Beyes and Chris Steyaert, "Spacing Organisation: Non-Representational Theory and Performing Organisational Space," *Organisation* 19, no. 1 (2011). Non-Representational theory suggests that we understand space not as representations of already established bodies of knowledge, but as pre-individual social practices rather than the practice of 'actors'. This suggests that we rethink the doing of space from the view that all performances are precarious and unstable and thus need continuous re-enacting. The value of each performance of space thus becomes interpreted on its own merits, without reference to pre-existing notions of space.

¹²⁶ David Gregory, "Defiled Cities," *Singapore Joournal of Tropical Geography* 24, no. 3 (2003): p 308.

¹²⁷ "When space is performed differently it is different. It becomes different and may have alternative and differentiating effects. As it does, the world continuously becomes a different world." See, David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (Abingdon, Oxon: Routledge, 2010), p 17.

¹²⁸ Raka Shome, "Space Matters: The Power and Practice of Space," *Communication Theory* 13, no. 1 (2003): p 40.

Rockies reinforces Canadian independence, or how the Dover Cliffs in England are perceived as “the embodiment of nation in a place.”¹²⁹

Conversely, other writers argue that it is not borders and belonging that are contrived, but the landscape in which these exercises and intuitions take place. Trudeau’s work on landscapes argues that the discursive and material boundaries that couch particular territorial landscapes give the impression that “particular arrangements of values, aesthetics, and behaviour are considered normal or natural.”¹³⁰ He gives the example of zoning by-laws, which he argues have traditionally been used to establish and communicate, not only “spatial categories of acceptable social behaviour and visual aesthetics,” but to exclude certain social groups from certain areas as well.¹³¹ In this way landscapes themselves become *cultural artefacts*.

Some critics of spatial theories have suggested that the processes through which spatial analyses sometimes takes place has the effect of essentialising views of space and place and the identities that they give rise to. The division of space has always been about making clearer distinctions between ‘here’ and ‘there’ and ‘us’ and ‘them’. By their very nature spatial practices are polarising. Yet, we can certainly recognise that the contents (i.e. inhabitants) of space *clearly* occupy several places at once. For instance, both my body and my actions are governed by the State-space, the private sphere, my home-space, and gendered-spaces characterised by preconceived roles about correct female behaviour. Despite the continuous overlaps between the imagined geographies that constitute one’s identity, spatial theories do not go far enough in recognising the hybridity of that identity. There is lack of acknowledgement of the deep and complex interconnections between relationships and phenomena that occur in space. Articulations of space tend to “displace[...] those dualities in which [...] space is traditionally divided: nature/culture, chaos/civility...”¹³² As Bhabha notes, this is a particularly salient aspect of the ways in which colonial space is understood, and he argues that a failure to recognise the hybridity of spaces leads to similar failures in acknowledging the hybridity of identities and subjectivities.¹³³ For writers like Whatmore, isolated spatial analyses that study ‘aspects’ of nature, one at a time, miss the point. She argues that, instead, we need to be considering the

¹²⁹ David Storey, *Territories: The Claiming of Space* (New York: Routledge, 2012), p 112-3.

¹³⁰ Daniel Trudeau, “Politics of Belonging in the Construction of Landscapes: Place-Making, Boundary-Drawing, and Exclusion,” *Cultural Geographies* 13, no. 3 (2006): p 422.

¹³¹ Ibid.: p 422-3.

¹³² Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994), p 177.

¹³³ Hybridity is a term that recognises the potential for plurality ‘from within,’ which gives rise to new trajectories and forms of being that draw inspiration from those that came before it – a dialectical synthesis of two or more ideas. It is a concept that recognises non-polarity, or realities that ‘fade into one another’ and thus become difficult to categorise with any consistency because they embody features of the other but also come to represent new formulations of reality in their own right.

possibility of 'hybrid spaces'.¹³⁴ The significance of rethinking space in this way becomes important to my discussion in Chapter Three and Four, when I consider how the legal and political geographies of the Reservation, public parks, and Tribal Areas conceal crucial human interactions and social networks when we understand them as 'non-overlapping' and compartmentalised spaces and places.

Authors like Latour have argued that spatial analysis needs to focus less on 'polar' spaces, spaces that are coherent unities and focus on overlapping spaces and 'liminal' spaces.¹³⁵ Latour argues that:

Critical explanation has always began from the poles and headed toward the middle, which was first the separation point and then the conjunction point for opposing resources...In this way the middle was simultaneously maintained and abolished, recognised and denied, specified and silenced...How?...By conceiving every hybrid as a mixture of two pure forms.¹³⁶

In the study of human geography this tendency manifests itself in the nature/society binary, where geographical imaginations are always turned towards distinguishing the 'natural' environment from the 'social environment' – or the idea that Whatmore refers to as the 'built environment'. As she demonstrates, much of the professional and political world has the tendency to "impress this binary imaginary on the fabric of the world."¹³⁷ The aim, she argues, has to be the "building [of] theories whose 'geometries, paradigms, and logics break out of binaries...and nature/culture modes of any kind.'"¹³⁸ Frontier-literature within a variety of disciplines develops this idea of liminality, particularly in relation to how law manages these spaces.¹³⁹ They highlight how these are spaces in which human agency and individual subjectivity flourish and are most pronounced precisely because the members' lives depend on

¹³⁴ Sarah Whatmore, "Hybrid Geographies: Rethinking the 'Human' in Human Geography," in *Human Geography Today*, ed. Doreen Massey, John Allen, and Philip Sarre (Cambridge: Polity Press, 1999).

¹³⁵ Liminality is a concept that points to the potential absence of a view or position. In spatial discourse, liminality refers to the spaces existing within the juncture between two distinct spatial poles (places of becoming). Examples would include frontier spaces or national borders. It is a place described as 'betwixt and in-between', a place of deletion and delimitation. Liminal spaces, as such, have frequently been described as 'non-places'. Developed as a stage of study in the field of anthropology and rites of passage, liminality has been described as a threshold or transitional phase between two social spaces or places. For Van Gennep the study of liminal stages is about investigating the types of rituals that take place as individuals transition from one social status to another (namely, from the sacred to the profane). See, Victor Turner, "Betwixt and Between: The Liminal Period in Rites of Passage," *Betwixt and between: Patterns of masculine and feminine initiation* (1987). Also see, Arnold Van Gennep, *Rights of Passage* (London: Routledge, 1960).

¹³⁶ Latour as quoted by Whatmore. See, Sarah Whatmore, "Hybrid Geographies: Rethinking the 'Human' in Human Geography," in *Human Geography Today*, ed. Doreen Massey, John Allen, and Philip Sarre (Cambridge: Polity Press, 1999), p 24.

¹³⁷ Ibid., p 25.

¹³⁸ Ibid.

¹³⁹ Tracey Banivanua Mar, "Frontier Space and the Reification of the Rule of Law: Conlonial Negotiations in the Western Pacific, 1870-74," *Austl. Feminist LJ* 30(2009). Also see, Julie Evans, "Where Lawlessness Is Law: The Settler-Colonial Frontier as a Legal Space of Violence," *Austl. Feminist LJ* 30(2009).

their ability to be flexible with their identities, to take risks in the choices that they make, as they negotiate the spaces *between* two stable spatialities.

The study of these liminal spaces and an understanding of how these spaces interact and are reproduced through the natural environment is an idea that this thesis specifically explores and relates to law in Chapters Two, Three and Four. In these three chapters I draw attention to the ways in which common assumptions of stable and coherent spaces are in fact derived from incoherent, consistently fluctuating imagined geographies. For example, I study the pristine wilderness, as a discourse and a judgment made about the natural environment, and discuss how it operates to, at one moment, define the land as insufficiently used and thus a 'wasteland' (i.e. *terra nullius*, or the primitive lands of tribal groups), while in other moments has the effect of structuring it through notions of traditionalism and mysticism (i.e. protected areas of parkland).

E. Imaginative Geographies

Spatial knowledge, what we know (or think we know), about space is partly determined by what we imagine space to be. In this context "the imaginary [becomes] a form of awareness, as a knowledge that does not owe its place simply to the constitution of reason."¹⁴⁰ While imagined geographies may symbolise one's 'fanciful' reconstruction of space, they demonstrate a degree of durability because they are reinforced through a series of discursive practices and histories of scholastic inquiry through which they are misrepresented as pre-given and organic realities. For example, over the course of this thesis I discuss how the imaginative geographies of parkland, the wastelands of the desert, the Princely States, and the public/private divide take on moral categories, and often become defined through binary tropes of modern/primitive, civilised/ savage, tropes that are consistent with Said's dichotomy of the Orient/Occident.

i. *The Imaginative Geographies of 'Orientalism'*

Perhaps no other work has been as widely associated with the notion of imagined geographies as Edward Said's *Orientalism*. Building on the foundations of the Foucauldian 'knowledge is power' dynamic, Said's theory of Orientalism argues that social power is exercised through the 'manufacture' of knowledge. Writing within the context of Imperialism, Said defines 'Orientalism' as "a style of thought based upon an ontological and epistemological distinction between the 'Orient' and (most of the time) the 'Occident'."¹⁴¹ Europe invents the Orient as a geographical reality, and ascribes to 'Orientals' particular (and often incompatible) ideologies

¹⁴⁰ Doreen Massey, John Allen, and Philip Sarre, eds., *Hybrid Geographies: Rethinking the 'Human' in Human Geography*, Human Geography Today (Cambridge: Polity Press, 1999), p 44.

¹⁴¹ Edward Said, *Orientalism*, vol. 1 (London: Vintage Books, 1988), p 2.

and aspirations.¹⁴² European hegemony is reinforced through its representation of the Orient as, not only different, but *inferior* to the European Occident. The ability to produce and circulate knowledge about the Orient is tantamount to controlling the Orient, and is thus perceived as an exercise of Occidental power.

Orientalist discourse draws attention to the pervasive intellectual power of an imagined geography (i.e. the Orient) that has been produced through the constant representation of non-European cultural difference, exoticism, and unmitigated passion (pleasure), emotion (vengeance) and overindulgence.¹⁴³ The Occident's political and ideological power rests on the ability to portray an Orient that embodies habits, ideals, and philosophies entirely irreconcilable with those of Europe. In constructing the European self-identity the Orient had to be made into a society of excess – uncivilised, uncouth, exotic, and infantile. Said's work draws attention to the discursive power of Orientalist discourse. Monopoly over the production of knowledge *about* the Orient, the dissemination of images and its representation of subjective experience as objective truth, had the effect of collapsing European cultural experience into objective fact. The Occident was thus able to represent the Orient in ways irrespective of how the Orient defined itself. This practice, according to Said, pervaded Western literary, historical, and political discourse about the Orient and its people.¹⁴⁴ From Said's work it becomes possible to trace the process through which imagined geographies have the potential to become *moral geographies*, and how they begin to represent judgments that societies make about proper and improper behaviours.

The discourse of Orientalism is further significant because it draws attention to how the native internalises this external-construction of his world, and projects back the demeaning image that has been imposed upon him by the Occident. This is a view that was first advanced by Fanon in his ground-breaking book, *Black Skins, White Masks*.¹⁴⁵ He expresses how black identity is fashioned in contradistinction to the white man, so that even when the black man believes in racial equality, he is unable to express himself outside of the racialised Otherness of the white man's gaze. Fanon notes:

And then we were given the occasion to confront the white gaze. An unusual weight decided on us. The real world robbed us of our share. In the white world, the man of colour encounters in elaborating his body schema. The image of one's body is solely negating. It's

¹⁴² Ania Loomba, *Colonialism/Postcolonialism 2nd Edition* (New York: Routledge, 2005), p 42.

¹⁴³ P. Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (London: Routledge Cavendish, 2007).

¹⁴⁴ Edward Said, *Orientalism*, vol. 1 (London: Vintage Books, 1988), p 3.

¹⁴⁵ F. Fanon, *Black Skin, White Masks* (Pluto Press, 1986).

an image in the third person. All around the body reigns an atmosphere of certain uncertainty. I know that if I want to smoke, I shall have to stretch out my right hand and grab the pack of cigarettes lying at the other end of the table. As for the matches, they are in the left drawer, and I shall have to move back a little. And I make all these moves, not out of habit, but by implicit knowledge. A slow construction of my self as a body in a spatial and temporal world – such seems to be the schema. It is not imposed on me; it is rather a definitive structuring of my self and the world...¹⁴⁶

The black man, therefore, becomes a caricature of the white man's imagination, unable to fully represent himself independently of the schema created for him by the white man. For Fanon this splits the black body from his self-perception so that "out of the blackest part of my soul, through the zone of hachures, surges up this desire to be suddenly white. I want to be recognised not as *Black*, but as *White*."¹⁴⁷ The native craves recognition, and therefore seeks it through imitating the identity prescribed to him by the colonised. In this thesis, I discuss how this 'black schema', this blueprint of inferiority, is represented by the conceptual design of territory. Moreover, in the third chapter I explain how native communities are trying to frame their demands for recognition using the schema of territory in the hopes that their status as sovereign nations will be recognised. However, the problem with this is that the concept of territory was historically developed so as to legitimise native dispossession and European cultural superiority. Consequently, 'territory' gives native communities false hope by, on the one hand claiming to enhance their prospects for recognition, while on the other, continuing to maintain the unfettered sovereignty of the nation-State.

3. Examining the Intersection of Law and Geography

In this thesis I make important connections between imagined geographies and the law, as well as exploring how they are involved in shaping one another. Law underwrites space to make certain relationships and events possible, and space operates in order to make legal regulation (particularly the unequal application of the law) invisible to us. This relationship between law and space is made particularly visible in later discussions of Vitoria's *jus gentium* where native resistance to a reciprocal right of travel legitimises European conquest. The thesis draws on the ideas presented in this literature to argue that law conditions social reality at the same time as being produced through social relations.¹⁴⁸ As a result of this intimate relationship between law

¹⁴⁶ Ibid., p 90-1.

¹⁴⁷ Ibid., p 45.

¹⁴⁸ Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," *Research in Law and Sociology* 3(1980): p 4. Also see, Alan Hunt, "The Critique of

and space, we need to take seriously the work of critical legal geographers who argue that law and geography cannot be studied in isolation, but in tandem and as *aspects of one another* that co-operate to produce social phenomena and shape social action.¹⁴⁹

A. Legal Geography and its 'Critical' Turn

Earlier approaches to the study of law and geography, collectively organised under the umbrella of legal anthropology and the sociology of law, adopted a comparative law perspective where the territorial organisation of the globe was a taken-for-granted presumption. These studies typically examined the various features that proximally located cultures shared, and highlighted the ways in which they differed from those located at a distance. Tied to this were geographic analyses of law, which investigated the influence of climate and physical environments on the development of legal cultures,¹⁵⁰ and later studies of the transnational mobility of legal models,¹⁵¹ which attempted to determine the potential success of legal transplants. Law was treated as if it belonged in a "detached, asocial realm from where it can 'act' upon space,"¹⁵² and frequently *social* space, itself, was conflated with physical space.¹⁵³

More recently, however, geographers have drawn on the spatial turn in social science discourse, and have adopted new approaches to researching the intersection between law and space (or law and geography). A number of critical legal geographers have questioned how societies 'create' space, and what role law has to play in facilitating, impeding, and influencing spatial practices. From this perspective, law is understood as unequivocally bound to 'the social'. The analysis of critical legal geographers adopts as its focal point, the relationship between law,

Law: What Is 'Critical' About Critical Legal Theory," *Journal of Law and Society* 14, no. 1 (1987). Also see, AC Hutchinson and PJ Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought," *Stanford Law Review* 36, no. 1/2 (1984): p 200.

¹⁴⁹ Nicholas Blomley, David Delaney, and Richard T. Ford, eds., *The Legal Geographies Reader* (Oxford: Blackwell Publishing, 2001). Also see, Nicholas Blomley, *Making Space for Law*, ed. Murray Low, Kevin R. Cox, and Jennifer Robinson, *The Sage Handbook of Political Geography* (London: Sage, 2008).

¹⁵⁰ John H. Wigmore, "A Map of the World's Law," *American Geographical Society* 19, no. 1 (1929). But academic interest in the links between environment, territory, and governance did not just appear with the materialisation of CLS. For example, in the late nineteenth century, sociologists like Ellen Semple argued that the physical environment played a significant role in constructing what she calls 'land bonds'. Social communities are as much constituted by the land, as by the people that form them. Semple also wrote eloquently about allusions of historic progress that are sustained by reference to expressions of solidarity and socio-political power. She asserted that much of the Imperial world was able to generate this view of unity, a 'mastery of the land', merely because the area that they had to 'master' was so small. Power was far more pronounced because differences and dissent were easily quashed through direct force. Her research illustrated a powerful direct link between spatial-governance and power. See, Ellen Semple, "Studies in Political Areas. Iii. The Small Political Area," *American Journal of Sociology* 4, no. 3 (1898).

¹⁵¹ Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle," *American Anthropologist* 108(1994). Also see, Bernhard Grossfeld, "Geography and Law," *Michigan Law Review* 82(1984).

¹⁵² Blomley cites Stiglbauer as an example, see Nicholas Blomley, *Law, Space, and the Geographies of Power* (London: Guildford Press, 1994), p 33. Also see, Kim Economides, Mark Blacksell, and Charles Watkins, "The Spatial Analysis of Legal Systems: Towards a Geography of Law," *Journal of Law and Society* 13, no. 2 (1986).

¹⁵³ Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, *Space and Legal Pluralism: An Introduction*, ed. Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, *Spatializing Law: An Anthropological Geography of Law in Society* (Surrey, England: Ashgate, 2011), p 2.

space, and the exercise of socio-political power. This allows us to understand the materiality of law (how law is expressed and made manifest) as it relates to the effects of space.¹⁵⁴ Unlike the sociology or anthropology of law, critical legal geography sees law and social space as mutually-constitutive, inseparable, and as continuously *performed* elements of social life. As Delaney notes, this innovative shift within the literature transpires from a new vision of how law operates in the everyday realities of social life, “[t]he legal is continuously and creatively *done* and *redone*. The legal is always *happening* [emphasis in original].”¹⁵⁵

What is most distinctive about the project of critical legal geography is its integrated view of law and space as the ‘spatio-legal’, what Blomley refers to as the ‘splicing’ of law into space. Delaney captures a similar idea when he discusses the ‘braiding’ of law as “worldly, pragmatic processes of their mutual constitutivity *across* each analytically distinct modality (the imaginary, the performative, the material)”¹⁵⁶ Thus, academic literature in the area of law and space looks at how the spatial and legal are “imagined, performed or materialised *in terms* of each other [emphasis in original],”¹⁵⁷ along with how other aspects of social existence may influence these performances, imaginings, and materialisations (i.e. identity, labour, sexuality, citizenship). This move to *world* law has been a particularly significant element of the CLG movement which has defined as its central ambition, the exploration of how the legal and spatial ‘*happen*’ in order to reveal “the pragmatics of world-making.”¹⁵⁸

Critical Legal Geography (CLG) provides an approach which helps us to understand the reasons why certain geographic distributions emerge in the way that they do. For example, Ford has studied the intersection between legal jurisdiction and race to reveal insights about the distribution of race and ethnicities in space.¹⁵⁹ In Chapter Three I also explore Peters work on Aboriginal migration in Canada to examine some of the reasons why mainstream Canadian society becomes *more* anxious about Aboriginal presence when migration out of the Reservation is at its lowest and net out-flow of Aboriginals *out of urban centres* is at its

¹⁵⁴ Soja’s, for instance, considers the relativity of space, that space is organised and ‘made real’ through “a mental ordering of phenomena.” He argues that unified conceptions of space (or spatial coherence) as well as spatial divisions or fragmentations are, too, “social products and often and often an integral part of the instrumentality of power.” See, Edward W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989), p 125-6.

¹⁵⁵ David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making* (Abingdon, Oxon: Routledge, 2010), p 19.

¹⁵⁶ *Ibid.*, p 23.

¹⁵⁷ *Ibid.*

¹⁵⁸ Which Delaney calls the ‘nomospheric’ studies of spatio-legality. *Ibid.*

¹⁵⁹ Richard Thompson Ford, “The Boundaries of Race: Political Geography in Legal Analysis,” *Harvard Law Review* 107, no. 8 (1994).

highest.¹⁶⁰ The perception of Aboriginal migration gives the impression that the Reserve system is 'not working', and steps must be taken to prevent this outflow. Accordingly, some of the insights of CLG become important in the context of examining Indigenous rights, diversity and minorities in liberal societies because they help reveal illogical connections between social perception and spatial distribution and, thereby, focus much needed attention to how the spatial and the political are interlinked.

i. *The 'Law-in-Space' Approach*

Studies of the spatio-legal tend to adopt one of two different modes of inquiry, what Delaney refers to as either the 'law-in-space' approach or the 'space-in-law' approach. Work that can be grouped under the umbrella of 'law-in-space' looks at how spatialised legal practices work to produce and reproduce our social space, with a specific concentration on how legal and social actors become involved in transforming and shaping the legal meaning of spaces.¹⁶¹ For example, and I discuss this further in the third chapter of my thesis, the Canadian State has been heavily involved in giving native cultural practices in geographic settings legal recognition as expressions of native custom and law.¹⁶² Similarly, in Chapter Four I analyse how spaces concentrated with native presence and regulated through native custom have been interpreted as *lawless*. The legal value of these places has been diminished by boundaries drawn between the cultural and political.

The law-in-space approach investigates the ways in which legal processes and regulation create spaces of exclusion and exception (in terms of membership, but also spaces of exception from having 'benefit' of the law),¹⁶³ give the impression of ownership or possession of space,¹⁶⁴ or create an entitlement of exclusive access or power over a particular space.¹⁶⁵ In shaping our lived-in world, especially territory, in particular ways, the law has a tremendous degree of influence over the interactions that take place, or are allowed to take place, in these areas. Scholarship in this area examines the myriad ways in which the law is involved in dividing and

¹⁶⁰ Evelyn Peters, "'Our City Indians': Negotiating Meaning of First Nations Urbanisation in Canada 1945-175," *Historical Geography* 30(2002).

¹⁶¹ David Delaney, "Beyond the Word: Law as a Thing of This World," in *Law and Geography: Current Legal Issues 2002, Volume 5*, ed. Jane Holder and Carolyn Harrison (Oxford: Oxford University Press, 2003), p 68.

¹⁶² *R. V. Van Der Peet*, 2 S.C.R. 507(1996).

¹⁶³ E. Bruce-Jones, "Race, Space, and the Nation-State: Racial Recognition and the Prospects for Substantive Equality under Anti-Discrimination Law in France and Germany," *Colum. Hum. Rts. L. Rev.* 39(2007). *Also see*, Sherene Razack, "When Race Becomes Place," ed. Tania Das Gupta, et al. (Toronto: Canadian Scholar's Press Inc., 2007). *Also see*, ———, "Gendered Racial Violence and Spatialised Justice: The Murder of Pamela George," in *Race, Space, and the Law: Unmapping a White Settler Society*, ed. Sherene Razack (Toronto: Between the Lines, 2002).

¹⁶⁴ *Also see*, Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004).

¹⁶⁵ Richard T. Ford, "Law's Territory (a History of Jurisdiction)," *Michigan Law Review* 97, no. 4 (1999). *Also see*, Shaunnagh Dorsett and Shaun McVeigh, "Questions of Jurisdiction," in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (Abingdon, Ox: Routledge-Cavendish, 2007).

enclosing our lived-in environment by mapping rules onto geographic space that have the effect of reducing people's mobility into and out of divided areas, and limiting the scope of interaction between those located on different sides of these spaced divisions.¹⁶⁶ There are also related studies that survey the ways in which the law restricts free movement within spaces through geographies of incarceration, both formal and informal, and how these places of confinement are then overwritten by other discourses of oppression such as race and gender.¹⁶⁷ I specifically discuss the Aboriginal Reservation as one expression of law-in-space – a geography constructed through an interaction between State and native law - which has significant implications for the opportunities available to Aboriginal communities in Canada and Australia.

This analysis (of CLG as it relates to space and law and, in turn, to categories of exclusion such as race and gender) becomes crucial for studying how law perpetuates processes of exclusion while misrepresenting them as exercises of power. I draw on these ideas in Chapter Four and my discussion of the Tribal Areas of Pakistan, which examine how the idea of territorial autonomy has had the consequence of compartmentalising cultural difference and separating the Pakhtuns from mainstream Pakistani society. Yet, at the same time, this right of autonomy appears to have empowered the Pakhtun community, giving the impression that the State perceives them as nations of 'equal' political and social standing.

The law also shapes and partitions our environment in ways that affect our sense of self and perceptions of belonging to a political community. The national border is one political construction that is 'loaded' with the law, manned by competing (sometimes adversarial) systems of governance on either side, and frequently perceived as the transitory point for potential 'corroders' of national identity.¹⁶⁸ As a construct inscribing the territorial limits of the State, and where potential entrants are 'cleared' for access, the border is a space constructed by and through law. The way in which the border is legally constructed and socially performed (by a number of local agents, including the border agent and the potential entrant, but also law

¹⁶⁶ Don Mitchell, "The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States," in *The Legal Geographies Reader*, ed. Nicholas Blomley, David Delaney, and Richard T. Ford (Oxford: Blackwell Publishing, 2001). Also see, Robert C. Ellickson, "Controlling Chronic Misconduct in the City Spaces: Of Panhandlers, Skid Rows and Public-Space Zoning," in *The Legal Geographies Reader*, ed. Nicholas Blomley, David Delaney, and Richard T. Ford (Oxford: Blackwell Publishing, 2001). This is a trend that has also been identified by those studying the controversial UK policy of using Anti-Social Behaviour Orders to neutralise certain spaces of particular types of people and behaviours. See,

¹⁶⁷ Mona Oikawa, "Cartographies of Violence: Women, Memory, and the Subject(S) of 'Internment'," in *Race, Space, and the Law: Unmapping a White Settler Society*, ed. Sherene Razack (Toronto: Between the Lines, 2002).

¹⁶⁸ Richard W. Whitecross, "Migrants, Settlers and Refugees: Law and the Contestation of 'Citizenship' in Bhutan," in *Spatializing Law: An Anthropological Geography of Law in Society*, ed. Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths (Surrey, England: Ashgate, 2011).

enforcement personnel) has a significant impact on identity-construction.¹⁶⁹ The fact that patrolled borders are underwritten by a formal set of codes that lay out the criteria for access, conceal the officer's potential for bias or use of subjective reasoning, and provides their decision-making an aura of objective legitimacy.¹⁷⁰ This work, then, reveals to us the particularly powerful position of law-enforcers as *performers* of space (i.e. in that they reproduce space through their specific action).¹⁷¹

This is most clear in the case of those who seek entry past the border – such as refugees and migrants – but these demarcations and performances are also relevant to some minority communities within the State, such as Indigenous groups living on the Reservation. In these instances, the courts become performers of space, compelling Indigenous groups to behave in very specific ways in order to maintain their treaty rights (i.e. to remain on the Reservation and not move into mainstream spaces). In Chapter Three I discuss how courts performances of the Reserve-space have a negative impact on native communities' enjoyment of their citizenship rights. I also look at how these performances have the effect of distorting Aboriginal identity by compelling Aboriginals to shape their sense of self in ways that may be inconsonant with how they self-define.

Studies of the border expose the ways in which law, and particularly the routinisation of legal activity, helps to neutralise legal decisions. For example, in studies of Aboriginal title jurisprudence, the laying down of standard criteria for demonstrating possession (i.e. continuous occupation and use of land since time immemorial) suggests that a 'productive' use of space is what controls these interactions between liberal law and Aboriginal communities. In reality, however, what constitutes 'productive' has a Eurocentric bias towards industrial and commercial development that has existed since the first Imperial-Indigenous encounters and has been encoded through imperial and colonial law.

But critical legal geographers have also explored the 'spatio-legal' as sites of resistance. These authors have examined, for example, native resistance to colonial regimes of power,¹⁷² and

¹⁶⁹ Some authors discuss this in terms of the border experiences of minority communities and how they are identified as dangerous Others. Mary Bosworth, "Border Control and the Limits of the Sovereign State," *Social Legal Studies* 17, no. 2 (2008).

¹⁷⁰ Anna Pratt, "Between a Hunch and a Hard Place: Making Suspicion Reasonable at the Canadian Border," *Social & Legal Studies* 19, no. 4 (2010).

¹⁷¹ Though, equally important, many socio-legal scholars have also stressed the ways in which, not only institutionalised responses, but mundane everyday social practice has the potential to produce and reproduce (racial/gendered/ethnic) margins and peripheries. See, Kitty Calavita, *Immigrants at the Margins: Law, Race, and Exclusion in Southern Europe* (Cambridge, UK: Cambridge University Press, 2005).

¹⁷² Bonita Lawrence, "Rewriting Histories of the Land: Colonisation and Indigenous Resistance in Eastern Canada," in *Race, Space, and the Law: Unmapping a White Settler Society*, ed. Sherene Razack (Toronto: Between the Lines, 2002).

racial and gendered transgressions of space which often work to disorient and complicate the prevailing gender/racial hierarchies and 'order of things.'¹⁷³ I draw on their insights in my discussion of the Aboriginal women from the Yankunytjatjara, Antikarinya, and Kokatha regions of Southern Australia. Through this analysis I reveal how these women not only contest Anglo-European visions of space through their own terrestrial identities, but also demonstrate how their relationship with the earth is further strengthened by their femininity and role as 'mothers'.

ii. ***The 'Space-in-Law' Approach***

Conversely the space-in-law method of inquiry looks at how legal discourse is structured through spatial metaphors and how these spaces attempt to perform, while simultaneously concealing the influences of, law. Perhaps the most frequently discussed spaces within law are the abstract public and private sphere. While public space is defined as a place where the law *can be found*, the private domain is marked by law's absence. Three important implications arise in this categorisation of the public and private. The first is, in defining the private sphere as lawless, certain structures of authority (e.g. the State) give the impression that its law is distinctively different from the law of other normative orders. I discuss this implication in the first part of Chapter Three and my study of colonial India, where I suggest that this presumption leads to the idea that separate 'laws' need separate spaces in which to operate. Moreover, this also implies that 'the legal' and 'the social' are two separate categories of interaction and creates the illusion of law being a closed, objective, and impartial system of regulation that is beyond the influence of social norms and culture. Abstracting legal validity from social interactions that take place within the private sphere fails to recognise that these interactions may hold legal meaning for participants. This, in turn, produces hierarchies of law, in which the normative dominance of the law in the public sphere overrides that operating within the private realm.

Secondly, the public/private distinction removes behaviours that the political authority does not wish to engage with (or finds threatening) by relegating them to the private sphere. This has the effect of trivialising 'private' behaviours and it also encourages us to think that these behaviours do not belong to the 'real world'.¹⁷⁴ Some authors argue that the public/private

¹⁷³ For instance, there is some postcolonial literature that discusses the production of hybrid identities during the colonial period, looking at how colonisation produced a *dislocation* of culture by giving people the opportunity to transgress imposed identities. As identities in-between made it difficult to use absolute binaries in categorising race, the racial spaces (themselves underwritten by normative codes prohibiting intermixing) became more difficult to sustain. See, Homi Bhabha, "Of Mimicry and Man: The Ambivalence of Colonial Discourse," *October* 28(1984).

¹⁷⁴ For instance, the relegation of women to the 'private' sphere has created a particular impression of the value of women's work in the home as child-carers and housewives. See, Liz Bondi, "Gender and Dichotomy," *Progress in Human Geography* 16, no. 1 (1992). Freeman and Mensch give the example of falling in love as a 'private matter',

distinction works to contain or conceal the multidimensional nature of identity-construction. Studies related to this issue look at the idea of 'meta-space', spaces of hybridity and 'in-betweenness' that are concealed from us by virtue of their being "domains 'between' or 'beyond' spaces and places that we generally accept as unambiguously public or private."¹⁷⁵ The idea of in-between spaces, or liminal spaces, becomes particularly valuable in assessing the North-West Frontier and its historical place as a buffer-zone between British India and Russian Afghanistan. In creating the Frontier as a buffer zone its people are understood as either extensions of Afghanistan or India, but never as fully autonomous agents. As I suggest in Chapter Four, this has had some very problematic consequences for their later inclusion into the national identity and political community of Pakistan.

The third important implication of the public/private dichotomy is that it allows law to use space as a way of making invisible its effects and some of its most subjugating tendencies. The notion of legal jurisdiction, for example, artificially dichotomises human interactions, creating the impression that simultaneous actions are actually happening in separate spatial and temporal domains. So, for example, legal jurisdiction comes to reflect the idea that religious practices are confined to the 'private sphere', and that they have no place in the public domain. These actions are understood as 'traditional' (back in time) and must be confined to the home (though often places of worship are not private at all). In creating these separate spaces for action, legal geographies like the private sphere give the impression that "we operate within a protected sphere of autonomy, free to make self-willed individual choices, and to feel secure against the encroachment of others."¹⁷⁶ In Chapter Four I evaluate these assumptions and suggest that these claims are based on a misconception. Often these spaces do not represent an *absence of official law*, but spaces of *legal excess*.¹⁷⁷ The private space is often where law operates in abundance, implicitly controlling some of the most intimate aspects of our lives. There are recent examples that point to how State-law is encroaching on the private sphere to regulate social interactions for the 'good of the public', for example tapping our phones and recording our internet activity. Governments have invaded the private space of the home by, for example, enacting laws against domestic violence and certain types of sexual relations (i.e. incestual or paedophilia). In some instances, this encroachment takes the form of State

which nonetheless has tremendous significance for human beings. See, Alan Freeman and Elizabeth Mensch, "The Public-Private Distinction in American Law and Life," *Buffalo Law Review* 36(1987): p 239.

¹⁷⁵ Mary Ann Tétreault, "Frontier Politics: Sex, Gender, and the Deconstruction of the Public Space," *Alternatives: Global, Local, Political* 26, no. 1 (2001): p 53-4.

¹⁷⁶ Alan Freeman and Elizabeth Mensch, "The Public-Private Distinction in American Law and Life," *Buffalo Law Review* 36(1987).

¹⁷⁷ Cooper discusses this in terms of excessive governance by both State institutions and civil bodies. See, Davina Cooper, *Governing out of Order: Space, Law and the Politics of Belonging* (London: New York University Press, 1998).

regulation over family privacy and issues related to our reproductive choices.¹⁷⁸ At other times the private sphere represents areas of legal excess because, apart from State intrusion, our social interactions are also influenced by the presence of religious laws and cultural norms, which shape, for example, our gendered identity and determine how we behave with those around us.

Various forms of social regulation intersect within the private sphere to shape how we relate to others and, as Freeman and Mensch note, law's encroachment on the private domain generates legal consciousness, an awareness about the law, even in those instances when we are engaged in the most intimate and personal private behaviours.¹⁷⁹ This 'awareness of the law' is made more evident when transgressive performances of space take place, by which I mean ways of doing space that are unexpected or, out of the norm. For example, in Chapter Three I discuss how the treaty rights of Aboriginals are suspended if they migrate off the Reserve. As a space of 'Aboriginal containment' those that defy these legal geographies and their regulation of social interaction face the possibility of having their legal rights curtailed. In these instances the 'public' space outside of the Reserve is revealed as not public at all if you are an Aborigine. The Reserve becomes a space made by the law for the very purposes of withholding legal entitlements, or shaping legal action.¹⁸⁰

Interestingly, Sutherland work explores how a 'lack of space' within which the law can visibly extend its thumping fist of regulation creates spaces of unpredictability, alterity, and danger. Sutherland considers the legal regulation of nomadic lifestyles and settlement patterns, and draws attention to how these practices are problematic because of our conventional understanding of "social and legal forms of societies being organised around individuals being fixed in place."¹⁸¹ This literature argues that part of the analytical difficulty arises from the fact that sedentary societies have 'fixed' identities, in the sense that those identities are spatialised, materialised in property, and thus give rise to a permanent address and location. However, with

¹⁷⁸ Carla Makhlouf Obermeyer, "Reproductive Choice in Islam: Gender and State in Iran and Tunisia," *Studies in Family Planning* 25, no. 1 (1994). Also see, Anju Malhotra et al., "Realizing Reproductive Choice and Rights: Abortion and Contraception in India," (2003).

¹⁷⁹ Alan Freeman and Elizabeth Mensch, "The Public-Private Distinction in American Law and Life," *Buffalo Law Review* 36(1987).

¹⁸⁰ Brenna Bhandar speaks of how raciality and spaces of ownership (as property) were co-constituted and served to withhold a recognition of subjectivity from the native Other. See, Brenna Bhandar, "Plasticity and Post-Colonial Recognition: 'Owning, Knowing, and Being'," *Law Critique* 22(2011). Razack also discusses this racialisation of space in her study of the courts creation of a space intersected by Aboriginality and prostitution in which the violence against Pamela George (a murdered Aboriginal prostitute) was regularised. See, Sherene Razack, "Gendered Racial Violence and Spatialised Justice: The Murder of Pamela George," in *Race, Space, and the Law: Unmapping a White Settler Society*, ed. Sherene Razack (Toronto: Between the Lines, 2002).

¹⁸¹ Anne Sutherland, "Complexities of U.S. Law and Gypsy Identity," *The American Journal of Comparative Law* 45, no. 2 (1997): p 393.

the shifting places and spaces that gypsy populations occupy, it becomes to virtually impossible to 'verify' their identity. As Sutherland notes, the law has difficulty with people who cannot be located in space because those people become "hard to control."¹⁸² Constant mobility and impermanent settlement cause problems for a law that is entirely rooted in controlling social interactions in and through space. This concern with limits in law running parallel to limits in space is also raised by scholarship that discusses how certain legal spaces become 'invisible' because they defy the traditional expectation that the boundaries of law and territory should be coterminous. These themes are further explored in my examination in Chapter Three of the Australian government's designation of areas as deserted desert-lands.

4. Concluding Comments

In this chapter I have mapped the trajectory of socio-spatial discourse by reference to two significant intersecting bodies of academic literature. In the first part of this chapter I discussed how theorists have disrupted fixed and passive notions of space to reveal how space is reproduced through social interaction and individual performance. Space is something that is *done* and *redone*. In 'spacing' social life, social scientists have drawn attention to the contingencies of space, and they have thereby exposed the myriad ways in which the wide-open spaces of our environment have been converted into places of meaning and belonging. This work highlights how spaces collude to shape and determine the social interactions we engage in on a daily basis. Despite spotlighting the socially-constructed nature of space, this chapter argues that spatialities have the potential to hold deep meaning for their users, not least because they are often essential components of identity-building.

In the second part of this chapter I built on this 'spatial turn' within the social sciences by examining some of the more prominent discussions in the areas of legal geography. Traditional investigations into law and geography reveal the ways in which law produces territory, and territory reproduces the law. However, a more critical variety of legal geographers have taken this a step further to show how law is materialised in space and also vice versa, space materialised in law. This, therefore, gives rise to situations in which the two cannot be properly disentangled from one another. This chapter also highlighted studies that explore some of the more contentious expressions of legal space in the form of racialised and gendered places and spaces of legal exclusion. I also drew attention to the ways in which societies imagine and institute divisions in space to conceal the excesses of laws operation, and how these spaces of division trivialise certain interactions while privileging others. This idea is expressed more

¹⁸² Ibid.

clearly in my analysis of the Tribal Areas of Pakistan, in Chapter Four, where the tribal space is not neutralised of liberal law (as it first appears), but it is rather a space characterised by an *overabundance* of regulation.

The current body of scholarship has been explored and investigated with the aim of drawing attention to two important ideas that I will explore throughout this thesis. The first is that space and law are related. We understand 'the legal' by being able to anchor it in the spatial, and we observe, perform, organise, and interact with our environment in ways that consistently, and constantly, draw on the law. Second, I draw attention to how the spatial turn in the social sciences affirms not only the simultaneity and disorderliness of space, but also the simultaneity and disorderliness of law. Dominant legal discourse has been, to a large extent, focused on maintaining a strict division between law and society, a division that is thoroughly complicated by the introduction of space into legal discourse. According to these perspectives it becomes clear that we can no longer hold law to this objective and impartial standard that pervades the more conventional legal theories'. Chapters Two and Three will specifically examine this issue by studying the historical development of the notion of territory, as a spatial form that is constructed through the processes of Imperial conquest and colonisation. I draw on many of the concepts and claims discussed in this chapter to examine the socially-constructed roots of territory. I will also explore the many ways in which the colonial relationship between legal regulation and the imagined geographies of territory complicates the operation and function of liberal within the postcolonial context.

Chapter Two

Mapping the Imperial-Indigenous Encounters

Occidental Legality and the Making of Territory

1. Introduction

The next two chapters need to be read as a consecutive narrative of Occidental Legality and its production of territory. Occidental legality signifies an impulse to employ geographic space as a mechanism for fashioning and structuring social interaction in a way that empowers certain groups over others. The conceptual product of this impulse is 'territory'. As the pre-eminent container of social relations and political decision-making today, territory has come to represent a natural, passive background of social and political life. However, in this chapter I question the established assumption that territory, as a representation of space, is apolitical. Through this chapter I expose the ways in which a territorial construction of space is *cultural*. Territory is the product of jurisdictional struggles between two normative communities that are, for the first time, coming into contact with one another. It is partially produced through European perceptions of non-European lands and peoples and the documentation of those perceptions in various types of cultural texts.

In this Chapter I assess the underpinning machinery of intellectual thought and social practice to expose how the notion of territory is driven by the idea of cultural difference. By aiming to bring the work of these apparatuses into sharper focus, I reveal a strong correlative relationship between geographic, cultural, political, and legal power. Territory as a material construct emerges from dynamic intersections between cultural, geographic, and political and legal knowledge. Like time, space needs to be understood as a project of continuous *becoming*, and territory symbolises a powerful representation of space that is "the cumulative effect of past human action and thought."¹⁸³

Rather than a tangible and material reality, we need to think of territory as an *idea*, an idea of how to best organise the social space so that it privileges certain values and interests. This idea has been put into practice through the erection of material enclosures and borders, the mobilisation of discursive knowledge, and the implementation of social rules that mould, manage, and discipline these processes. Territory is *made real*, given meaning, and enabled as a

¹⁸³ Allen M. Howard and Richard M. Shain, eds., *The Spatial Factor in African History: The Relationship of the Social, Material, and Perceptual* (Boston: Brill Publishers, 2005), p 4.

construct that produces certain consequences, through centuries of intellectual and political and legal enforcement. For some, territory is not merely a “political way of conceiving land, but the political corollary of a calculable...concept of space;”¹⁸⁴ a conception of space that is ‘finite,’ ‘material’, and ‘divisible’. On a more practical level, territory is performed and enacted through everyday social interactions that both reinforce its power and contest it. Collectively these strategies are referred to as ‘territoriality’.¹⁸⁵

Today, when we think about geographic space we are overwhelmingly drawn to space as ‘territory’ – bounded, discontinuous, enclosed, and underlain by claims of ownership.¹⁸⁶ Over the course of these next two chapters I frame this conception of territory through an analysis of *how* and *why* territory has come to dominate our spatial consciousness. Occidental Legality is the term I use to collectively refer to the European impulse to *spatialise* power and its consequences. I draw attention to how the environment represents the medium through which European voyagers and political agents from the fifteenth to twentieth century tried to exercise control over new lands and strange people. These processes of interpretation, classification, and control led to the production of geographic spaces structured by raciality and cultural difference. In particular I identify and focus on three key techniques through which these spaces were imagined and arranged – cartography,¹⁸⁷ ethnography (i.e. travel writing and letter-writing), and political and legal structures of governance. Through this analysis I trace how foreign places were constructed in ways that were often inconsistent with the publicly stated intentions of voyagers and colonisers. In uncovering these inconsistencies I demonstrate how these spatial techniques represent exercises of power meant to further oppress subject-populations.

Frequently the effects of each of the three techniques are difficult to separate. However, as I show in the next two chapters, this overlap is precisely what makes cartography, ethnography, and political and legal structures of governance such powerful strategies for imagining and structuring space. Cartography and travel writing reinforce one another so that the ‘objectivity’ of the map draws inspiration from the subjectivity of experience. In turn, political and legal

¹⁸⁴ Stuart Elden, "Missing the Point: Globalisation, Deterritorialisation and the Space of the World," *Transactions of the Institute of British Geographers* 30, no. 1` (2005): 8-19.

¹⁸⁵ Robert David Sack, *Human Territoriality: Its Theory and History* (Cambridge: Cambridge University Press, 1986).

¹⁸⁶ See Kimmerling's article, where he considers how State's fix their territorial space through the regulation of private ownership of land. Kimmerling also makes an interesting observation when he notes that in modern global politics sovereignty substitutes for ownership. See, Baruch Kimmerling, "Sovereignty, Ownership, and 'Presence' in the Jewish-Arab Territorial Conflict," *Comparative Political Studies* 10, no. 2 (1977): p 156-7.

¹⁸⁷ Harley defines cartography as “a body of theoretical and practical knowledge that map-makers employ to construct maps as a distinct mode of visual representation.” Thus, rules of cartography vary across societies. See, John Brian Harley, "Deconstructing the Map," *Cartographica: The international journal for geographic information and geovisualization* 26, no. 2 (1989): p 3.

structures of governance rely on both cartography and ethnography to enact and legitimise certain forms of control and rules of social regulation. The partial gaze of each of these methods is made invisible by being reinforced by the others. Based on the reinforcement that these techniques receive from one another, I defend the idea that often the spaces of the Imperial-Indigenous encounters were characterised by a collapsing of 'what is seen' and 'what is known', so that subjective experiences were transformed into objective truths.¹⁸⁸ This, I argue, led to the development of a series of rules and regulations that were meant to protect and strengthen this conflation of knowledge with geographic experience.

But what is the value of building this narrative of territory? Chapter Two focuses on analysing two forms of Imperial 'witnessing' - cartography and ethnography - to expose how they collectively produced places that were divided, enclosed, and possessed. In showing how the most characteristic features of territory were themselves constructed through subjective European experience I shed light on how this further complicates structures of governance developed within the colonial and postcolonial environment. In Chapter Three, I undertake a more detailed analysis of the relationship between Occidental Legality and forms of law and governance that made the transition from the colonial to postcolonial period. The value of this project stems from its ability to show a connection between European spatial experience and postcolonial State-minority relations. One feature, *inter alia*, is that there is a dialogical relationship between colonial constructions of space and the development of colonial (and later postcolonial) law.

In this chapter I focus on European ideological and intellectual modes of control that lay the foundations for later forms of political and legal governance. Some analyses of colonial and postcolonial contexts suggest that the Imperial-Indigenous encounters were an event characterised exclusively by a relationship of European domination and native oppression. This may, in turn, encourage the view that colonialism simply represents "the oppression, humiliation, and exploitation of Indigenous peoples."¹⁸⁹ However, this approach is reductive because it completely discounts the many instances in which these encounters gave rise to situations and identities marked by hybridity, liminality, and the crossing-over of ideas and perceptions. Thus, this narrative is as much about the prominence and paramountcy of

¹⁸⁸ As Richards notes, Imperial Britain was an "empire built in a series of flimsy pretexts that were always becoming texts." He chronicles the mass production of geographic, biological, and political 'knowledge' produced by the British Empire, 'raw knowledge' in need of organising, and which worked to 'know' the conquered land in a bid to exercise power over it. See, Thomas Richard, *The Imperial Archive: Knowledge and the Fantasy of Empire* (London: Verso, 1993), p 4.

¹⁸⁹ George H. Nadel and Perry Curtis, *Imperialism and Colonialism* (New York: The Macmillan Company, 1964), p 3.

territorial interpretations of the world, as it is about practices of protest and processes of resistance to that vision.

2. Overview of Chapter

Section (3) of this chapter begins with a brief note of clarification, in which I discuss two of the key concepts that will be used readily throughout the following chapters. In Section (4), I set the stage for exploring European geographic experiences in the Americas, Asia, and Africa by examining an historical account that has deep relevance for international legal theorists studying the origins of the inter-State system. The Treaty of Tordesillas, apart from documenting the first attempts made by Europe to exercise greater global control - "the seizing or comprehending of the world as a whole"¹⁹⁰ - exemplifies the immateriality of 'territory' as a concept, as a *jurisdiction*, which involves the mapping of one's laws onto geography. I spend a few moments discussing the Treaty of Tordesillas and Spain and Portugal's struggle to carve up the totality of the world's space between two, peripherally located, and geopolitically ignorant, Empires. Following from this, Section (5) moves on to what is really the heart of this chapter, and examines the four effects of European attempts to regulate events, phenomena, and peoples by controlling the geographic area that they occupy (territoriality). I investigate how these effects create the bounded, enclosed, and owned spatiality that we now refer to as 'territory'. The connecting theme that informs this analysis is that the notion of territory emerges from a history of Europe's exercise of discursive, cultural, and political power through colonial space and in relation to colonised peoples. This chapter concludes with Section (6) and some final notes on the social production of territory before I move on to Chapter Three, which discusses the political and legal forms of governance that rely on (and further bolster) a territorial ordering of people and relationships.

3. Concepts of Clarification

The following two sections briefly discuss the concepts of 'witnessing' and 'Occidental Legality'. As I use them frequently, and because they are highly dynamic and 'loaded' terms, it is necessary to more fully explicate my how I understand and use them.

¹⁹⁰ Stuart Elden, "Missing the Point: Globalisation, Deterritorialisation and the Space of the World," *Transactions of the Institute of British Geographers* 30, no. 1` (2005): p 9. The specific task of 'cosmography' – a geographic ordering of the world - rather than geography.

A. 'Witnessing' Knowledge

In tracing the development of territory from the Imperial-Indigenous encounters, it becomes apparent that experience and knowledge frequently converge within the European geographic imagination. As such, what is *witnessed* by European observers often comes to represent the *real*.¹⁹¹ In speaking of 'witnessing' I refer to European sensory experience of foreign lands, expressed through cartographic processes and letter- and travel-writing which chronicle European voyages. These experiences are useful sources by which to evidence the process of reasoning that underlies the production of Eurocentric beliefs and practices. This, as I will demonstrate throughout this thesis, has an impact on the forms and structures of law and governance. Over the course of the European voyages, geographic anomalies - what Benton refers to as 'singularity' - are made sense of by the discourse of the 'marvellous'¹⁹² and 'monstrous', sometimes through the simultaneous invocation of both. Judgments about what counts as either marvellous or monstrous are made by using European referents of modernity and civilisation. Often this has the effect of construing any diverging traditions, practices, and histories as inhuman and savage.

Within the European imagination, geographic singularity frequently translates into cultural, and later legal, singularity. Geography becomes integral to the development of Imperial law, whereby:

[g]eographic tropes featured prominently as a shorthand way to describe some of the spatial variations of Imperial law. In somewhat haphazard and decentralised ways, a fluid discourse about geography urged associations between physical properties and qualities of law and sovereignty.¹⁹³

Most importantly, it becomes increasingly clear that the law which emerges within the colonial setting, in these distant places, diverges significantly from the law of the metropole. In contradiction to the widespread perception that colonial law unfolded as a uniform system spanning passive and stable geographies, the narrative of Occidental Legality that is developed over the next two chapters shows how the legal regimes that emerged within the colonial space borrowed heavily from local rule and tradition. The aim of this chapter, therefore, is to unsettle the perception that colonial law was systematically 'rolled out' and evenly applied across the colonial world. The law in Britain's overseas colonies was most certainly an amalgam of

¹⁹¹ Laura Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (New York: Cambridge University Press, 2010).

¹⁹² Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* (Oxford: Oxford University Press, 1991).

¹⁹³ Laura Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (New York: Cambridge University Press, 2010), p 7.

Imperial and native legal regimes, and this is a reality that is adamantly denied within contemporary Euro-Western legal discourse. Territory, I argue, plays an important role in creating this 'singularity' from what are, undeniably, pluralities within the law. I want to bring into sharper focus the innumerable instances during Imperial rule where both law and geographic knowledge relied on each other for stability and cover, and existed as co-conspirators in tempering, and at time broadening, the fragmentation between new social communities encountering each other for the very first time.

B. Occidental Legality

The word 'Occident' has been employed by prevailing literary and geopolitical discourse to mean 'the Western world' (as distinct and separate from the Eastern world), or simply the 'West'. The term has a spatial component, in that it aims to *locate* the object or phenomena to which it is affixed. But, because 'Occident' is a relational concept it requires an 'Orient' against which it derives its own meaning, it is a term that locates *in relation to something else*. It can therefore be understood as a 'direction' as much as it is a 'location'. What I mean by this is that it has a stable and relative component; while its location (i.e. 'the West') has the potential to remain fixed, its directionality may change depending on the varying positions from which it can be observed. This is important to keep in mind because, as the case study in Chapter Four will demonstrate, there are emerging situations in which 'the Orient' may be imagining itself (and may be imagined by other groups within the Orient) as 'Western' (i.e. espousing 'Western values'). In my previous analysis of Orientalist theory, and the work of Fanon, I believe that this self-perception of 'Westernness' has much to do with the need for the self to be *recognised* as a legitimate political entity.¹⁹⁴

Building on the above idea, 'Occident' is also used to signify an entity – '*the West*' – and all the ideological and intellectual biases that these determinations incur. Thus, I use the term with an awareness of both its relatively stable and consistently transforming, components of meaning, as well as the fact that it is frequently used to signify a particular set of ideologies, frameworks of knowledge, and types of practices.

I introduce the term Occidental Legality as a label which captures the colonial impulse to locate, or *spatialise*, power and the consequences that this gives rise to. At the same time, however, it is worth emphasising that it is not an impulse that is limited to European colonisers. Rather it is an understanding of power that permeated the colonial experience and could frequently be identified and traced to European and non-European sources (and everything in-between these

¹⁹⁴ See my discussion on p 60.

strict binary descriptors). While in Chapter Two, the discussion that follows focuses mainly on the European impulse for regulating and categorising social relations through reference to geographic space, Chapter Three develops this analysis through a focus on the non-European adoption of this vision and, in some cases the non-European rejection of this vision, as well as its consequences for political and legal governance in colonial and later postcolonial societies.

From the analysis undertaken over the course of these two chapters it is possible to argue that this is a highly charged and provocative use of Occidentalism precisely because it aims to *dislocate* the underlying expectations we have of it. Yet, Occidentalism is a term that perfectly describes the processes and sensibilities that informed the Imperial-Indigenous encounters, in the sense that the spatialisation of power was meant to *fix* subjective meaning in order to produce an objective reality. While the Imperial-Indigenous encounter was structured by hybridity – as a result of shifting allegiances, identities, and structures of governance – spatialising power gave the impression of stability, of permanence, of endurance. In essence, spatialising power worked to alleviate growing anxieties about the unpredictability and precariousness of the colonial environment and its attendant social relations.

In Chapter Three I demonstrate how colonial and postcolonial forms of governance draw on an earlier Imperial coupling of geographic and cultural knowledge (which is what is being discussed in this chapter). The linking of geographic space with cultural difference had the tendency to minimise normative plurality and even more so, normative overlap, within the colony. That is, while looser patterns of politico-juridical relations characterised the early periods of European expansion, the growing focus on territorial possession prompted the standardisation and centralisation of political authority. This shift coincided with the even more ambitious project of European overseas settlement and land appropriation. As the autonomy of the Imperial powers became connected to the exclusive control over and settlement of geographic space, visible markers of this exclusive control began to appear (e.g. boundaries, borders, policing). These symbols of geographic ownership were critical for disciplining alternative performances and visions of space by native populations. As space and place became integral to not only European economic and cultural hegemony, but also political power, colonial governments became less receptive to maintaining conditions of normative pluralism, and instead structured the native-settler relationship as one of disproportionate levels of political and legal development. Native communities were perceived as the benefactors of European civilisation, and their own indigenous institutional structures were swept under the rug, as if they had never existed and intimately interacted with the development of colonial law.

In developing this argument in Chapters two and three, I draw particular attention to the ways in which Occidental Legality naturalised and institutionalised a culturally-divisive view of geographic space. At the same time, I consider the dialogical reproduction of this vision by analysing how this model of space was reinforced through the responses of many native peoples that were the objects of its most violent and oppressive tendencies. In this Chapter I focus on the complicated history of Occidental Legality, a history structured through map-making, travel writing, and their relationship with political and legal structures of governance. The history of Occidental Legality gives an account of territory that is brimming with exercises of power and counter-power, where colonisers and the colonised are equally involved (though not equally empowered) in producing a notion of space that is derived through perceptions of cultural difference.

4. The Treaty of Tordesillas as an Envisioning of European Conquest

The Treaty of Tordesillas was an agreement sought by the Spanish rulers Ferdinand and Isabella after Columbus' voyage to the New World in 1494. Alarmed by the Portuguese's growing ocean power¹⁹⁵, the Spanish sought Papal support to secure their claims of possession against the Portuguese and all potential future claimants. They were successful in convincing Pope Alexander VI to issue a Papal bull delimiting the Spanish and Portuguese spheres of influence,¹⁹⁶ and the dividing line was set 370 leagues to the west of the Cape Verde Islands. Spain was given exclusive right to navigate the seas and possess all newly discovered lands to the west of the divide, while Portugal was given the same title to the east. By placing Europe in the 'centre' of the globe, the Papal bull issued a division of geographic space into two traversable hemispheres; a division that would underpin European political and cultural power for the next five centuries.

A joint expedition was to be launched by the two rulers to map out exactly where the dividing line would exist, and a tower was to be erected as a boundary-marker. The expedition never came to fruition, as both became embroiled in discussions over the costs and benefits of fixing a boundary. Perhaps the placement of physical boundaries was never pursued as the potential benefits were difficult to gauge given that these were places never before visited and there was

¹⁹⁵ Headrick writes that the Portuguese were the first kingdom to successful travel across the ocean - a feat attempted by many kingdoms (the Chinese, the Middle Eastern rulers, and the Polynesians) that had eventually failed. See, Daniel R. Headrick, *Power over Peoples: Technology, Environments, and Western Imperialism, 1400 to the Present* (Princeton, NJ: Princeton University Press, 2010), p 20-1.

¹⁹⁶ Steinberg has argued that the Pope's interest was also motivated by how division and conflict between the two Iberian Empires could affect the spread of Christianity into the New World. See, Philip E. Steinberg, "Lines of Division, Lines of Connection: Stewardship in the World Ocean," *Geographical Review* 89, no. 2 (1999): p 255.

little to confirm that they even existed. Interestingly, despite the boundary-marker never having been erected, Ferdinand ordered that the demarcation continue to be placed on all sailing charts to prevent Portuguese voyagers from accessing 'Spanish space'.¹⁹⁷

A. Potential Spaces, Imagined Places

There are several aspects of the Treaty of Tordesillas which would be a cause for concern to anyone examining these negotiations by contemporary standards. First, the agreement exhibits the obvious oversight that boundaries of influence were being established without any due consideration being given to the populations that were being divided and subjected to Spanish and Portuguese control. These spaces were already imagined as *empty*, its occupants imagined as little more than minor impediments to the expansion of Spanish and Portuguese influence. But apart from this, the terms of the Treaty were based on charting and dividing spaces that were entirely *imagined*,¹⁹⁸ and they were further imagined to be passive, inert, and open to discovery and (eventually) available for possession. The two kingdoms appeared to be laying claim to not only distant geographic areas, but potentially non-existent ones. The Imperial map, in both this context and every context thereafter, existed as an:

abstract vehicle that gave [the Europeans] the theoretical security that land existed along the westward course before [they] set foot upon it. By means of the map the European had a bird's eye view of the world...the map uniquely charted the first face-off between the cultural grammars of two different hemispheres.¹⁹⁹

Paradoxically, the map expressed a *theoretical* certainty that these places existed, at the same time as it presented *potential* opportunities to discover never-before visited spaces. The Imperial map was thus vested with a cultural significance because it claimed to provide the most accurate version of geographic reality, a reality conceived by Europeans for universal consumption. This pointed to the likelihood that lands discovered by virtue of the Imperial map would "take on the cultural form prescribed by the map [itself]."²⁰⁰

The Treaty of Tordesillas brings to light – in a very profound and visible way – the problematic designs by which the world has been constructed by those in positions of economic and political

¹⁹⁷ Though this stipulation, too, was not incorporated until nearly two decades after the Treaty was signed. See, Mary Wilhelmine Williams, "The Treaty of Tordesillas and the Argentine-Brazilian Boundary Settlement," *Hispanic American Historical Review* (1922): p 6. Williams lists a range of reasons why the provisions of the Treaty were never met, mostly because Portuguese interest in the New World waned, but also because the terms of the Treaty were extremely ambiguous.

¹⁹⁸ A practice that was consistently employed throughout the early periods of Spanish conquest. See, Barbara E. Mundy, *The Mapping of New Spain: Indigenous Cartography and the Maps of the Relaciones Geográficas* (Chicago: Chicago University Press, 2000), p 13-4.

¹⁹⁹ William Boelhower, "Inventing America: The Culture of the Map," *Revue Française d'études Américaines* 36(1988): p 211.

²⁰⁰ *Ibid.*: p 212.

power. Space is mapped in a fragmentary fashion, presented as owned by either one controlling agent or another. The Treaty further offers us a rare glimpse into one of the first documented instances in which territorial possession and jurisdiction had little to do with having roots in, or a historical tie, to claimed lands. While this is a standard that has been referenced in terms of how contemporary courts structure the postcolonial State's claims of sovereignty, it is a standard that is not extended to native peoples' making similar claims for title.²⁰¹ Thus, the Treaty draws attention to the contradictory logic that underlies contemporary claims of sovereignty and Aboriginal title.

Utterly disinterested in considering the possibility that these lands were not, essentially, 'for the taking', the Treaty of Tordesillas represents a conceptual emptying of distant territories (both real and imagined), and an overlaying of one's legal and political frameworks onto imagined geographies. From this we see the immateriality of territory as a geography mapped through the imposition of an Empire's law. The leap to later claims of *terra nullius* become less surprising given the view of the world that informs these treaty negotiations. In its depiction of imagined geographic areas, the Treaty could be said to have *anticipated*, and thus promoted, empire.²⁰² The Treaty of Tordesillas, therefore, offers us great insight into how invaders were able to "parcel[...] the [conquered lands] among themselves in designs reflective of their own complex rivalries and relative power."²⁰³

Contemporary studies of the Treaty expose the absurdity of imagined possession, the problematic assumptions underlying its claims, and reveal the political nature of map-making in the process of Imperial conquest.²⁰⁴ While these negotiations suggest that territory was an important aspect of European conceptions of power, this was a view that was not extended to the populations that potentially inhabited these 'imagined' lands. The relative ease with which the boundaries were negotiated, and the fact that the dividing-line was mapped more-or-less

²⁰¹ This suggests that European possession is held to a different standard than native possession. For example, as I show in Chapter Three, the Canadian court's renunciation of the doctrine of *terra nullius* has done little to quash existing European claims for sovereignty over non-European land.

²⁰² Bassett discusses this potentiality of map-making by reference to Empire-building in 19th century West Africa. Thomas J. Bassett, "Cartography and Empire Building in Nineteenth-Century West Africa," *American Geographical Society of New York* 84, no. 3 (1994): p 316.

²⁰³ J. B. Harley, *The New Nature of Maps: Essays in the History of Cartography*, ed. Paul Laxton (Baltimore, Maryland: John Hopkins University Press, 2001), p 59.

²⁰⁴ Stuart Elden, "Missing the Point: Globalisation, Deterritorialisation and the Space of the World," *Transactions of the Institute of British Geographers* 30, no. 1 (2005): 12-3. Figueredo mentions how the geography was altered in Portuguese maps so as to include certain areas within the "zone of Portugal's possessions." See, Fidelino de Figueredo, "The Geographic Discoveries and Conquests of the Portuguese," *The Hispanic American Historical Review* 6, no. 1 (1926): p 56.

equally between the two, suggests each Empire's recognition of the other's coevalness;²⁰⁵ a recognition that was seldom accorded to the peoples that these Empires eventually conquered.

Lastly, the Treaty illustrates an important theme that informs many of the key debates presented within this thesis, and that is the idea of how European overseas voyages entirely exploded the prevailing concept of distance and the logistical and material barriers that had, till that moment, prevented European presence in faraway places like Africa and the Americas. In crossing oceans, European travellers and political agents were confronted with a whole new, and previously unanticipated, set of economic and political possibilities. The meaning of distance radically shifted when Europeans came into contact with previously unexpected populations and practices. This unexpected 'newness' gave rise to anxieties that, as I show in the chapters that follow, inspired new ways of 'building-in' that distance, of controlling space and location in order to ideologically and intellectually recreate a perceived separation and to give the impression of remoteness and singularity in order to tame the alarming reality of proximity and plurality.

5. Techniques of Territoriality and European Experiences of Overseas Travel

I begin this next section of the chapter with a discussion of how much of the Treaty's underlying intuitions can be identified in how European voyagers and political agents processed and managed the diverse landscapes and peoples they encountered during their overseas voyages. I draw on Imperial cartography and ethnography in the form of travel writing and Imperial correspondence to draw attention to the ways in which both forms of European witnessing had the tendency to conflate perception with epistemology through the linking of geographic experience with cultural knowledge. I suggest that this tendency arose as a result of the belief that the spectacle of foreign lands and people could be understood and managed through the careful chronicling and categorisation of geographic and social difference. However, somewhere during the complex process of conveying geographic knowledge these chronicles of European experience reflected judgments of cultural incommensurability between the European agents and their native subjects. This, in turn, had the effect of justifying European possession of foreign lands, and the exercise of political authority over non-European peoples.

²⁰⁵ In using the term 'coeval' I refer back to the way in which Massey employs the term in *For Space*. For her, coeval existence implies temporal and spatial synchronicity; social groups exist in simultaneity (in space and time). She thus disrupts a linear view of history, suggesting instead the co-existence of multiple histories and multiple spaces, with each having value that cannot be determined in relation to another (time or space). See, Doreen Massey, *For Space* (London: Sage, 2005), p 8-9, 68.

I will explore how spatial experience led to the production of socio-geographic knowledge by organising my analysis in terms of the four effects that Imperial witnessing had on foreign space and its people: emptying geographic space of its normative content; mapping cultural knowledge onto geography; grounding identities in geographic space; and temporalising geographies of difference. I will explore how spatial experience led to the production of socio-geographic knowledge by organising my analysis in terms of the four effects that Imperial witnessing had on foreign space and its people. In so doing I expose a mutually-constitutive relationship between European travel writing – a largely subjective experience – and European cartography – a ‘scientific’ process that nonetheless draws heavily on the observations and ideas of ocular testimonies.

A. Emptying Geographic Space of its Normative Content

In this section I demonstrate how European techniques of territoriality created a conceptually emptied colonial space. In employing European referents of commercial, economic, infrastructural and political development, not only were explored areas represented as lacking European industriousness and ingenuity, but they were effectively sterilised of their non-European history and identity. These effects of Imperial witnessing made it possible for European voyagers to reproduce conquered areas according to the Imperial vision.

i. *Witnessing the Pristine Wilderness*

Through the Treaty of Tordesillas it is possible to identify the underlying sentiments of European conquest, namely that the globe appeared to the Spanish and Portuguese as *awaiting* European exploration. Based on this, it was not entirely unpredictable that tropes of discovery would figure prominently throughout Imperial ethnographic and cartographic processes. In many accounts of European witnessing it is possible to identify space being explained in terms of polarities – the pristine wilderness versus the humanised landscape.²⁰⁶ In juxtaposing the pristine and the manufactured side-by-side, these narratives often conveyed a sense of wonder and amazement:

The approach to the City of Palaces from the River is exceedingly fine; the Hooghly at all periods of the year presents a broad surface of sparkling water, and as it winds through a

²⁰⁶ For instance, in Humboldt’s witnessing of the Amazonian jungle we are drawn to the “vast solitude” of the pristine landscape. He notes, “here in a fertile country adorned with eternal verdure, we seek in vain the traces of the power of man.” We are given the distinct impression that Humboldt and his crewmen were the first to set foot upon this area. See Humboldt quoted in Neil Safier, “The Confines of the Colony,” in *The Imperial Map: Cartography and the Mastery of Empire*, ed. James R. Akerman (Chicago: University of Chicago Press, 2009), p 134. Yet, as Safier notes, his description of the Rio Negro is replete with human conflict, pointing to the disorderliness of the landscape, the desolation of the wilderness juxtaposed with the territorial politics of the tribal communities living within these areas.

richly wooded country, clothed with eternal verdure, and interspersed with stately buildings, the stranger feels that banishment may be endured amid scenes of so much picturesque beauty.²⁰⁷

Sometimes, however, European perplexity is replaced by an anxious confusion of having to come to grips with a level of diversity that made literal description and ideological containment all the more difficult.²⁰⁸ Often times this anxiety was expressed by way of two contradictory observations about the climate and geography of the exact same place.²⁰⁹ These depictions produced an environment that was simultaneously drab but untrammelled, lush but barren.

Narratives of Imperial witnessing were often organised in terms of common environmental tropes and models of nature and culture, making it possible to better “*locate* India, or its constituent regions, within a larger scheme [emphasis added].”²¹⁰ This need to categorise and locate was further expressed through the *naming* of space. This had the effect of converting any given space into a place bearing the (‘anglicised’) imprint of European discovery. The history of this space was thus divided into two separate, non-intersecting, epochs – one characterised by native habitation and local knowledge, and the other by European arrival and representation.²¹¹ The naming of spaces also had the added effect of implying that the area was empty, ‘unnamed’ and thus non-existent, before the Europeans appeared.

ii. ***Tropes of Discovery and European Benevolence***

While narrations of Imperial witnessing in themselves are little cause for consternation, given that they represent the personal observations and experiences of the European viewer, often these accounts served as the basis for purportedly ‘objective’ forms of representation, including map-making. In early mappings of potential overseas territory, many areas of the globe were left intentionally blank because they had yet to be verified through *European* discovery. D’Anville’s influential mapping of Africa in 1749 relayed a continent mottled by unfilled areas (see fig. 2.1). Similarly, his map of India was also crafted using exhaustive precision in portraying centres of European activity, while other parts of the subcontinent remained

²⁰⁷ Emma Roberts, *Scenes and Characteristics of Hindostan: With Sketches of Anglo-Indian Society* (London: W.H. Allen, 1837), p 1.

²⁰⁸ “He struggled to come to terms with a landscape that was bright, verdant, and bursting with life after the monsoons, but seemingly barren and ‘naked’ for much of the rest of the year.” See, David Arnold, *The Tropics and the Traveling Gaze: India, Landscape, and Science 1800-1856* (London: University of Washington Press, 2006), p 132.

²⁰⁹ Compare Roberts’ description in n.20 above with the description of India as a jungle of pestilence and disease. See, *Ibid.*

²¹⁰ *Ibid.*, (2006), p 33.

²¹¹ As Pratt notes, this ‘representation’ was often expressed through tropes of discovery, which involved “converting local knowledges (discourses) into European national and continental knowledges associated with European forms and relations of power.” See, Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (New York: Routledge, 2007), p 198.

sparsely detailed.²¹² While d'Anville is famed for employing very unusual techniques of mapping, which relied on travel narratives, along with poetry, philosophy, and literature to confirm the location of places, his method relied on places being repeatedly documented in a medium and language accessible to d'Anville in order for them to be considered *factual*. As the presence of these areas was verified through European discovery, documentation, verification, and representation, they became little more than images produced through the European gaze.

Moreover, while the truth was that the maps illustrated very select places of European expansion and enterprise, they were a material confirmation of European possession.²¹³ The effect of the blank spaces, particularly when juxtaposed with the very specific charting of places of European activity, was that its audience was persuaded of the illustriousness and improvement of conquest. Maps provided a visually and widely-accessible image of Europe's 'modernisation' of places (Africa, Asia and the Americas), an image that could hardly be verified by its primary consumers, who lived thousands of miles away. Blank spots on the map suggested that these places were of little value, with the sparse detailing representing a visual communication of having 'nothing to report'.

A map composed of vast voids not only brought the detailed sections into sharper focus, but also had the effect of homogenising the *unmapped*. While places that were already discovered and comprehensively recorded could easily be compared and differentiated, given the meticulous surveying of the land, mapping of terrain, and charting of topographic and climatic features, the barren spaces were visual cues reporting uniformity or sameness. Sparse detailing on a map not only standardised the geography of two differently located areas, but also the personalities and sensibilities of its inhabitants, who may have had very different linguistic, historical, and cultural identities. These 'non-places', now emptied of their normative content, could now become containers for entirely invented geographies like the fabled Kong Mountains in West Africa - fantasised as being rich in resources but an impediment to cross-border imperial

²¹² Lucy P. Chester, "The Mapping of Empire: French and British Cartographies of India in the Late Eighteenth-Century," *Portuguese Studies* 16(2000): p 257. Interestingly, d'Anville points to a politics of geography when he notes that spaces on the Indian map had been intentionally left blank on the request of the French East India Company. See, Matthew H. Edney, *Mapping an Empire: The Geographical Construction of British India 1765-1843* (Chicago: University of Chicago Press, 1990), p 5.

²¹³ Barbara E. Mundy, *The Mapping of New Spain: Indigenous Cartography and the Maps of the Relaciones Geográficas* (Chicago: Chicago University Press, 2000), p 13-5.

trade²¹⁴ – or the ever-mythical ‘India-Tertia’, a land where “there be dragons in the greatest abundance, which carry on their heads the lustrous stones which be called carbuncles.”²¹⁵



Figure 2.1 – d’Anville’s map of Africa (1749). Retrieved from: <http://www.bentleys.co.za/africa/y06.html>

In representing social difference as discretely bound and spatially fixed, Imperial maps had the tendency of stretching European benevolence by minimising native dispossession. If we look at the 1763-1775 map of the British Colonies in North America we can find a section of the map labelled ‘Crown Land Reserved for Indians’ (see fig. 2.2). It is a relatively small strip of land, wedged in-between the borders of British colonies in Quebec and separated from British colonies in the east by the Appalachian Mountains. This minute band of greyed-out space – an

²¹⁴ Thomas J Bassett and Philip W Porter, “‘From the Best Authorities’: The Mountains of Kong in the Cartography of West Africa,” *The journal of african history* 32, no. 03 (1991).

²¹⁵ Catalani Jordanus, *Mirabilia Descripta: The Wonders of the East*, trans. Henry Yule (Cambridge, UK: Cambridge University Press, 2010), p 41-5.

island of 'non-Europeanness' amidst a sea of European possessions – visually reflects an 'act of good will' that works to camouflage the fact that the entirety of the surrounding land was once inhabited (or inhabitable) by the very Indigenous groups that are now sequestered in a tiny area set apart from the rest of the settled population. Though it may appear that the cultural integrity of the Indigenous space has been preserved by the Crown prohibiting European settlement in areas earmarked for Indigenous use, the spaces reserved for the Indians already bears the marks of Imperial conquest, with its constitutive area internally divided and bordered, and its places bearing Anglicised names: 'Nashboro', 'Harrodsburg', 'Pt. Pleasant'. The map's legend itself refers to the spaces as 'possessions' of Britain, Spain, and France, and the inclusion of the '1763 Proclamation Line' appears to reinforce the idea that the space has had a long history of European ownership (first the French, now the British). The naming, division, and mapping of Indian land effectively silenced the Indian, giving the impression that the European was better situated to speak *for* the Indian than she/he was to speak for himself. Interestingly, this is a view that has carried forward to contemporary forms of managing diversity, whereby native claimants are forced to adopt the language of the dominant political and legal discourse, and to convey their demands through concepts like 'sovereignty', 'jurisdiction', and 'autonomy'. As I show in Chapter Three, these principles have the tendency to distort native claims, often translating question of access to opportunities and the distribution of resources as demands for cultural autonomy and territorial segregation.

Though maps that depict areas set apart for Indians may insinuate European benevolence, these spaces have already been scarred by an Imperial assault that will forever shape Indigenous life.²¹⁶ Indeed this 'act of good faith' is made all the more dubious by the fact that the 'White' and Indian lands are physically separated by the Appalachian Mountains, which act as a natural barrier between spaces of social difference. By obscuring the reality that the very group now confined to a tiny section of the land that they were once able to roam freely, these maps helped to legitimise European conquest and Empire through a projection of European goodwill.

²¹⁶ Indeed the distinctions outlined in the 1763 Proclamation had a profound impact (and continue to have a profound impact) on Indian and First Nations' status in Canada and the United States, and their claim over ancestral lands.

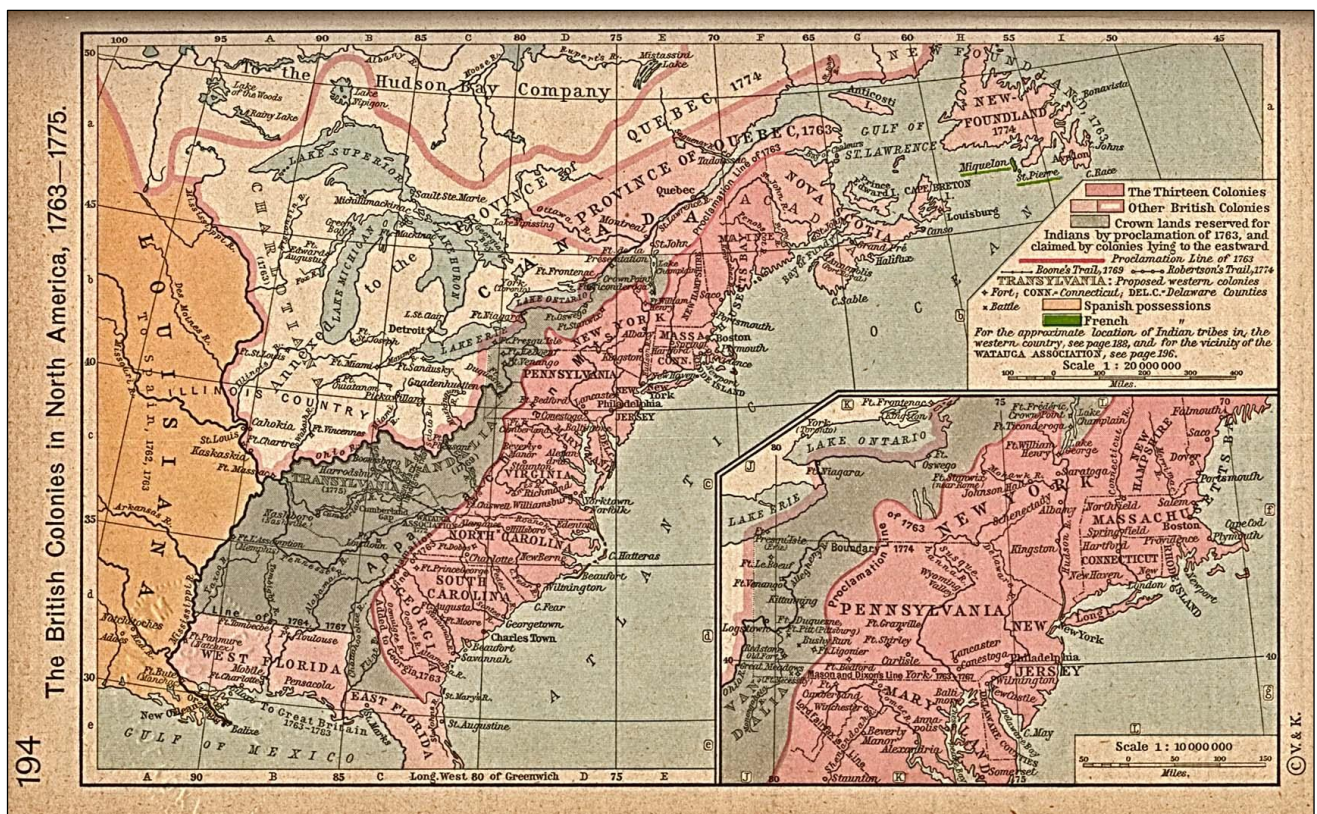


Figure 2.2 – The British Colonies in North America 1763-1775. Image retrieved from: http://www.lib.utexas.edu/maps/historical/shepherd/british_colonies_1763-76.jpg

While maps were a powerful representation of reality, in the sense that they were material representations of perceived or imagined difference, they were only one of the techniques by which perceptions of cultural difference were expressed and circulated. Insofar as representations are processes by which we give an object, person, or event meaning, the power of words and images can be further bolstered by the association of emotions. As such, Imperial correspondence was an even more powerful method of conveying subjective experience as knowledge, because it was a representation that tended to recreate reality in accordance with particular moral and social hierarchies in mind.²¹⁷ Accordingly, one of the most important advantages to studying travel writing is that, unlike cartographic processes, travel narratives give the audience a glimpse into the subjective attitude of the writer. The narratives relayed through travel journals convey a sense of awe, dangerousness, and adventure that could not be captured through the lines, dots, and dashes of a map. Travel accounts could more conveniently incorporate, and even more easily convey, moral judgments, and they could do so without needing to hide behind claims of objectivity.

²¹⁷ Richard Harvey Brown, "Cultural Representation and Ideological Domination," *Social Forces* 71, no. 3 (1993).

The theme of European benevolence could also be found within ethnographic accounts of Imperial witnessing, particularly within those narratives where European arrival is portrayed as being *welcomed* by the natives. In the opening pages of his book, *Marvellous Possessions*, Greenblatt cites a notable letter from Columbus to the Portuguese King which illustrates this theme. The letter was written during Columbus' first voyage to the New World in 1492. In this particular entry, dated, December 18, 1492, Columbus relays a meeting he had with a young native 'king' that he encounters while his ship is docked off the Spanish Island of Tortuga. Over the course of the lengthy passage, Columbus envisages an entire dialogue between himself and the native despite neither of them being able to understand the language of the other.²¹⁸ The sentiments and emotions that he associates with the visitor are derived from visual cues that he, unsurprisingly, interprets to his advantage.

And he [the native visitor] and his tutor and counsellors were very troubled because they did not understand me nor I them. Nevertheless, I gathered that he told me that if something from this place pleased me that the whole island was at my command...I told him how Your Highnesses commanded and ruled over all the best part of the world, and that there were no other princes as great. And I showed him the royal banners and the others bearing the cross, which he esteemed greatly. What great lords Your Highnesses must be, he said (speaking toward his counsellors), since from so far away and from the heavens they had sent me here without fear; and many other things passed between them that I did not understand, except that I saw very well that they took everything as a great wonder.²¹⁹

As Greenblatt notes, Columbus moves from "knowing nothing ('they did not understand me nor I them') to imagining an absolute possession ('the whole island was at my command')." ²²⁰ Readers are given the impression that the venture is legitimated through a native invitation of possession, and European arrival is both welcomed and *celebrated*. The appearance of the Europeans signalled the salvation of the Aborigine. If we look at Zamora's reading of Columbus's correspondence with the Spanish monarchy, we are treated to a spectacle of Indian gratitude.²²¹

²¹⁸ This appears to be a common trend in how Columbus interprets Imperial-Indigenous communication. Throughout his diaries we are exposed to encounters where the Indigenous community's use of hand 'signs' and 'symbols' are represented as if it was a language that the Imperialists were able to objectively and accurately interpret. In other instances, ocular witnessing was enough to determine Indigenous perceptions of Imperial advancement – "I had refused to receive the cotton from the native whom I sent on shore, although he pressed it upon me. I looked out after him and saw upon his landing that the others all ran to meet him with much wonder. It appeared to them that we were honest people, and that the man who had escaped from us had done us some injury, for which we kept him in custody." See diary entries of October 14, 1492 and October 15, 1492 at Christopher Columbus, "Christopher Columbus: Extracts from Journal (1492)," Fordham University, <<http://www.fordham.edu/halsall/source/columbus1.asp>>.

²¹⁹ Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* (Oxford: Oxford University Press, 1991), p 13.

²²⁰ Ibid.

²²¹ Margarita Zamora, *Reading Columbus*, vol. 9 (Los Angeles: University of California Pr, 1993), p 16.

This reality of sovereign possession, therefore, is an imagined reality, a distortion of experienced events; a reality that has no real objective basis. At the same time, the imagined dialogue acts as a muzzle, prohibiting the native from speaking, and allowing the European to speak his behalf. Through this curtailment of native subjectivity, we are once again given the feeling that spaces of conquest were awaiting discovery and its people longing for an outside voice to recognise and pronounce their existence. In these instances the Imperial agent saw his role as one of linking the native to the 'outside world'. It was through the agent's accounts, stories, and experiences that the native – as an idea, an image, an Other – was mined. Imperial cartography and ethnography reveals an attitude of European deliverance, as if it was the careful chronicling of the 'sites and sounds' of the conquered world that gave these places meaning, voice, and value. These narratives appear to be suggesting that an *external recognition* of one's uniqueness or exoticism is an essential aspect of one's cultural identity, and this, as I will show in the following chapters, is an inclination that all but disappears from the colonial to postcolonial transition.

B. Mapping Cultural Knowledge onto Geographic Space

Part of the reason that witnessing narratives were such a common practice during European expansion and conquest was because of their therapeutic value. In penning encounters, and communicating experiences, voyagers could come to terms with the irregularity of the event. In recording the curiosities of foreign lands, travel writers often demonstrated an 'ethnographic impulse'. While this began with detailed descriptions of the physical scenery it frequently phased into political discussions of the language, social order, religion, morality, and government of foreign societies. Often these narrations homogenised native communities and represented them as "landmarks of the natural environment."²²²

i. *Maps as a Method of 'Coming to Terms with' Difference*

Europe's overseas voyages in the fifteenth century were the first encounters of their kind. Apart from coming face to face with climatically and geographically diverse landscapes, these voyages challenged conventional conceptions of distance by *compressing* duration. Thus, the first Imperial-Indigenous encounters were the product of a contraction in time and space that could not have been previously anticipated. The alterity of the confronted landscapes was tempered and made sense of through the application of European referents. As Greenblatt explains, "in the face of the unknown, Europeans used their conventional intellectual and organisational structures, fashioned over centuries of mediated contact with other cultures, and that these

²²² Ricardo D. Salvatore, "North American Travel Narratives and the Ordering/Othering of South America (1810-1860)," *Journal of Historical Sociology* 9, no. 1 (1996): p 87.

structures greatly impeded a clear grasp of the radical otherness of the American lands and peoples.”²²³ By examining the unknown (foreign land) by reference to what was known (European land), European voyagers could normalise the singularity of the colonial encounter. It was furthermore a way in which the Other was rendered more palpable and the foreign landscape was made less daunting and more familiar.

Perhaps it was the *newness* of the event that inspired witnessing narratives that had a tendency to *exoticise* foreign landscapes while, at the same time, normalising them. It was as if foreign places *had* to be bizarre because to minimise the importance of distance was to, in many ways, evidence the ordinariness of one’s existence. If communities separated by such vast expanses, nonetheless, turned out to be similar, what does that say about the uniqueness of cultural identity and group solidarity? From this, it is somewhat expected that travel writing would aim to communicate only those aspects of the environment that challenged the traveller’s preconceptions. Indeed it would be those aspects of the encounter that one perceived as particularly strange and atypical that made the experience worth reporting.

However, what is interesting about these narratives is not that they make mention of difference or draw attention to the unfamiliar, but that they impute to it a quality of ‘lack’ or ‘deficiency’. Narratives about the lush jungles of India are underwritten by claims of death and disease, and the oppressiveness of the climate.²²⁴ Travel writing conveying the architectural grandeur of encountered structures deride the chaos of a landscape in which the imposing and palatial palaces are made to stand side-by-side with “mud hut(s), or rows of native hovels, constructed of mats, thatch, and bamboos...”²²⁵ In each of these scenarios the splendour of what is encountered is represented as a lack, as espousing some sort of deficiency, a disorderliness that makes it somehow *less than* the European culture in which the experience is being framed. Exoticism, therefore, stands-in for inferiority.

This trope of ‘the exotic’ is further extended to how the Europeans experienced the people inhabiting these places. We see mythical accounts of “savage cannibals who ‘wage unceasing war on the Indians, who are meek and fearful, for culinary purposes,’” alongside biblical portrayals of native bravery.²²⁶ There are graphic depictions that merge fact with fiction by

²²³ Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* (Oxford: Oxford University Press, 1991), p 54.

²²⁴ David Arnold, *The Tropics and the Traveling Gaze: India, Landscape, and Science 1800-1856* (London: University of Washington Press, 2006).

²²⁵ Emma Roberts, *Scenes and Characteristics of Hindostan: With Sketches of Anglo-Indian Society* (London: W.H. Allen, 1837), p 2.

²²⁶ Scillacio as quoted by Gerbi. Also see Gerbi’s reading of Peter Martyr See, Antonello Gerbi, *Nature in the New World: From Christopher Columbus to Gonzalo Fernandez De Oviedo*, trans. Jeremy Moyle (Pittsburg, PA: University of Pittsburg Press, 1985), p 29, 50-75.

using animal references in portraying native appearance - "red skins *like lions*, their entire bodies hairless, and ugly of feature..."²²⁷ Against the bestial representation of the native Other, the viewer stands as the defender of European scientific rationality.²²⁸

In many early accounts the value and agency of the native within cartographic processes is denied. Cartographers, travel writers, and European scientists all demonstrate scepticism towards the spatial testimonies of native inhabitants. In each instance European witnessing often carries greater weight than the 'word of the Indian'.²²⁹ Even over the course of 'authentic' and 'objective' processes of recording landscape, the native appears as ancillary to the process. For instance, Hooker laments that, other than the physical discomfort of palanquin travel, one of the further disadvantages of this method of studying the landscape, is the fact that "you pass plants and cannot stop to gather them; trees and don't know what they are; houses, temples, and objects strange to the traveller's eye, and have no one to teach where and what they may be; no fellow-traveller with whom to exchange curious remarks."²³⁰ Despite the palanquin being drawn by several native men, Hooker continued to feel isolated in his study of the landscape, completely overlooking the possibility that these men may be able to respond to his curiosities about the terrain and its unusual treasures. Similarly, Rennell also demonstrated an unwillingness to allow natives a contributory role in providing information for the purposes of map-making. Though he used native know-how several times during the course of his cartographic work in India, he was often cited as commenting on the unreliability of native knowledge.²³¹

The reproduction of native knowledge and know-how as objects of European discovery and mastery is a theme that resonates throughout the Imperial-Indigenous encounters and, later, within colonial models of governance (which I discuss in the following chapter). Often translating into a claim that Europeans were better equipped to 'know' the landscape than the people who have always inhabited them,²³² the linking of European knowledge to geographic

²²⁷ Ibid., p 49.

²²⁸ Matthew H. Edney, *Mapping an Empire: The Geographical Construction of British India 1765-1843* (Chicago: University of Chicago Press, 1990), p 32.

²²⁹ See Columbus' diary entry for October 19, 1492. Christopher Columbus, "Christopher Columbus: Extracts from Journal (1492)," Fordham University, <<http://www.fordham.edu/halsall/source/columbus1.asp>>. Also see, Nitin Sinha, *Communication and Colonialism in Eastern India: Bihar, 1760s-1880s* (London: Anthem Press, 2012), p 97.

²³⁰ David Arnold, *The Tropics and the Traveling Gaze: India, Landscape, and Science 1800-1856* (London: University of Washington Press, 2006), p 20.

²³¹ Nitin Sinha, *Communication and Colonialism in Eastern India: Bihar, 1760s-1880s* (London: Anthem Press, 2012), p 97-8.

²³² Rennell as quoted in Chester. See, Lucy P. Chester, "The Mapping of Empire: French and British Cartographies of India in the Late Eighteenth-Century," *Portuguese Studies* 16(2000): p 266. This also had the effect of disregarding or downplaying the centrality of natives to processes of European cartography. See, See Rennell's failure to acknowledge the integral role of sepoy Ghulam Mohammed over the course of his mapping of Hindoostan. See, ———, "The

mastery is a prelude to later exercises of power that are expressed by associating European geographic knowledge and the proficiency of European forms of governance. What we begin to see is that the Imperial agents' knowledge about foreign landscapes and climate is frequently imagined as strengthening their ability to govern the inhabitants of these foreign places.

ii. ***The Discourse of Tropicality***

The European production of knowledge about the native Other also took the form of locating foreign lands and people within a particular cultural discourse. Through a discourse of 'the tropics', voyagers were able to circulate very specific images of encountered places and to attribute to them a very specific and different set of aims.²³³ Expressed through the tropes of science and disease,²³⁴ tropicality involved the designation of places and peoples as part of a tropical environment, equally characterised by an intemperate and moist climate, lush vegetation, and the presence of disease and decay. "Designating a portion of the globe the tropics became a 'Western way of defining something culturally and politically alien, as well as environmentally distinctive, from Europe and others parts of the temperate zone.'"²³⁵ Tropicality, therefore, reinforced a hemispheric separation of the globe that was underwritten by a cultural difference that, at times, posed a physical threat (in the form of disease) to the traveller.²³⁶ Often this was expressed through narratives that "brought to [the witnessed space] a host of scientific and scenic ideas that ranged from the paradisiacal to the pestilential, from the impressionistic and Romantic, to the narrowly technical characterisation of plant and animal species."²³⁷ The power of tropicality emanates from an ability to represent spaces in a particular way, regardless of their actual 'scientific' positioning. Arnold notes that in the case of the tropicalisation of India "much (but by no means all) of the subcontinent lay within the tropics, though paradoxically, some of its most 'tropical' locations lay north of the Tropic of

Mapping of Empire: French and British Cartographies of India in the Late Eighteenth-Century," *Portuguese Studies* 16(2000): p 266.

²³³ John Sydenham Furnivall, *Netherlands India: A Study of Plural Economy* (Cambridge, UK: Cambridge University Press, 2010), p xv-xvi. Furnival notes that Burma is a country with "different aims and different traditions. Burma is a tropical country, recently brought into contact with the *modern* world, where Europeans have taken over the government, are developing the material resources, and have come to recognise a moral responsibility for the welfare of the people."

²³⁴ David Arnold, *The Tropics and the Traveling Gaze: India, Landscape, and Science 1800-1856* (London: University of Washington Press, 2006), (2006), p 42-73, 81.

²³⁵ *Ibid.*, p 35.

²³⁶ Pratt gives a rather interesting account of how exploration writing that reported accounts of animals found in the wild (e.g. gorillas) were widely processed through accounts of cannibalism in the area. The connection between the wild beast and African populations is a particularly intriguing aspect of tropicality discourse because it presents the 'tropics' as an area more bestial than human. And, in juxtaposing this characterisation of Africa alongside European scientific study bolsters the heroism of European travel by confirming the tropics as a precarious and dangerous environment that has the potential of threatening the European body in multiple ways. See, Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (New York: Routledge, 2007), p 204.

²³⁷ David Arnold, *The Tropics and the Traveling Gaze: India, Landscape, and Science 1800-1856* (London: University of Washington Press, 2006), p 35.

Cancer in the foothills of the Himalaya, and yet it failed in many scenic and scientific respects to conform to the idealised notion of the tropics..."²³⁸ While India could certainly not be classified as 'tropical' by reference to its climatic or geographic conditions, the discourse of Indian tropicity nonetheless served as a very powerful representation of Indian difference and atrophy.

iii. *The Aesthetics of Mapping*

European cultural representation took on many forms. While travel writing and cartography were particularly powerful European portrayals of non-European places and peoples, the fact that almost forty-percent of the British population was still illiterate by the eighteenth century made these representations inaccessible for a large section of the British population. Visual imagery and aesthetics worked to fill this gap in knowledge-production and circulation, and were thus an effective means by which these accounts could be made available to a wider audience. Apart from documenting and circulating ideas about European benevolence and political and economic accomplishments, the use of visual imagery on maps also conveyed the aesthetics of European culture.

It was by being juxtaposed with the death and ugliness of the tropics that the European capacity for beauty and artistic talent was constructed. Nowhere was Europe's receptiveness to beauty conveyed more persuasively than through the aesthetics of mapping, what to some, was a 'dark decaying space'. In the preface of the second volume of his *Historical Records of the Survey of India*, Phillimore writes, "I spent nearly three months in Dehra Dūn examining the early maps of the department, and was amazed at the wealth of beautiful drawings and artistic talent...of the early surveyors."²³⁹ Noting his amazement that the prevailing conditions in British India did little to impede the 'marvel' of the "work [being] turned out,"²⁴⁰ Phillimore goes on to remark that it is typically the most artistic maps that attract the greatest attention and thus "see the light of print."²⁴¹

The Imperial map becomes a powerful cultural symbol, defined equally as 'an art' and a 'technology.'²⁴² Not only did these artistic impressions represent an archive of geographic

²³⁸ Ibid., p 35-6.

²³⁹ R.H. Phillimore, "Historical Records of the Survey of India, Vol. II 1800-1815," ed. Order of the Surveyor General of India (Dehra Dun, India: The Surveyor General of India, 1950), xvi.

²⁴⁰ Ibid., p xvi.

²⁴¹ Ibid.

²⁴² Thomas J Bassett, "Cartography and Empire Building in Nineteenth-Century West Africa," *Geographical Review* (1994). On the other hand, Harley points to the cold, hard, insensitive look and feel of maps – documents appearing detached from the spaces that they reflect and explain. But he argues that this may be reflective of the overall aim of cartographers to remain 'objective' and 'technical' in their representation of geographic space. Also see, John Brian

relationships, produced in a widely accessible and aesthetically pleasing format, but also an influential testimony of European cultural hegemony. Rennell's 1782 mapping of *Hindoostan* is flourished with a most interesting *cartouche* in the bottom right corner. In it we view British Imperial prowess reflected through the figure of the lion and British military power represented through the drawings of the Indian sepoy. The viewer is struck by the benevolence of British authority, conveyed through the figure of Lady Britannia, who is being gifted the Hindu law book 'the Shastra' by natives who appear to be bowing to her glory (see fig. 2.3).²⁴³ Visions of European cultural and military superiority are easily relayed through the strategic placement of the emblem upon a map that was literally fashioned amidst Anglo-French rivalry.²⁴⁴ From this we can see that Imperial maps are cultural artefacts of a certain kind; they are social constructions that represent a particular cultural perspective.



Figure 2.3 – Cartouche from Rennell's Map of Hindoostan (1782). Retrieved from: http://memory.loc.gov/cgi-bin/map_item.pl

Harley, "Deconstructing the Map," *Cartographica: The international journal for geographic information and geovisualization* 26, no. 2 (1989): p 2.

²⁴³ Matthew H. Edney, *Mapping an Empire: The Geographical Construction of British India 1765-1843* (Chicago: University of Chicago Press, 1990).

²⁴⁴ What is further interesting about Rennell's map is that he used Jean d'Anville's work, who was commissioned by the French East India Company to produce a map of India, and who had done so without ever setting foot outside of Paris. Lucy P. Chester, "The Mapping of Empire: French and British Cartographies of India in the Late Eighteenth-Century," *Portuguese Studies* 16(2000): p 260.

C. Grounding Identities in Geographic Space

In the process of chronicling the bizarre and the extraordinary, European voyagers and political agents frequently collapsed geography and identity. Recognising geographic singularities became tantamount to discovering differences in the socio-cultural identities and sensibilities between European and non-European communities. The physical environment, as such, was a setting that could both open up and foreclose certain types of relationships between Europeans and natives.

i. *Identity and the Natural Environment*

In many witnessing accounts there is a conceptual linking of distance and social difference, whereby the presence of communities separated by vast distances and across oceans automatically implies cultural incommensurability. In many instances “geographic distance from the European/Christian centre implied a progressive degeneration and a loss of ‘cultural, moral, and linguistic integrity.’”²⁴⁵ Witnessing narratives, in this respect, were not routine observations, but politico-cultural appraisals.

The island is verdant, level and fertile to a high degree; and I doubt not that grain is sowed and reaped the whole year round, as well as all other productions of the place. I saw many trees, very dissimilar to those of our country, and many of them had branches of different sorts upon the same trunk; and such a diversity was among them that it was the greatest wonder in the world to behold. Thus, for instance, one branch of a tree bore leaves like those of a cane, another branch of the same tree, leaves similar to those of the lentisk. In this manner a single tree bears five or six different kinds. *Nor is this done by grafting, for that is a work of art, whereas these trees grow wild, and the natives take no care about them. They have no religion, and I believe that they would very readily become Christians, as they have a good understanding.*²⁴⁶

Spliced within these accounts of geographic witnessing are moral judgments made about the uncivilised and untamed character of the Indigenes, a personality that is borne out by the landscape itself. The singularity of this particular landscape became a space of marvel and wonder at the same time as representing a space in need of civilising. In claiming that the natives have the ‘good understanding’ to embrace Christianity, Columbus confirms their humanity, but continues to speak to their difference by labelling them inattentive and careless. In portraying the native Other in this way, Columbus assigns them a subhuman status,

²⁴⁵ Jyotsna G. Singh, *Colonial Narratives Cultural Dialogues: 'Discoveries' of India in the Language of Colonialism* (London: Routledge, 1996), p 23.

²⁴⁶ See October 16, 1492 diary entry. Christopher Columbus, "Christopher Columbus: Extracts from Journal (1492)," Fordham University, <<http://www.fordham.edu/halsall/source/columbus1.asp>>.

endowing them with the capacity to be 'saved', yet making it very clear that *they are not the same as him*.

Sometimes this linking of geography and identity is expressed through accounts that portrayed the native Other as an extension of the unruly and intemperate environment that he inhabited,²⁴⁷ with some writers suggesting a direct connection between topography, climate, and the "forms and habits of organised beings."²⁴⁸ Thus, in many ways geography was represented as a living, breathing, *acting* entity. It is therefore hardly surprising that later narratives and forms of contemporary governance minimised the humanity of encountered populations by according autonomy to *space* rather than *people*. We see this particular association between space and liberty become stronger as foreign places become further territorialised.²⁴⁹ I expand on this idea in greater depth in the fourth chapter of this thesis.

In some of these accounts we see the agency and autonomy of native communities being perceived as being linked with the impenetrable terrain, and unstable and fetid climates, that they occupy.²⁵⁰ But other times the conflation between geography and identity is expressed in a slightly different form and we are brought face-to-face with the idea that European domination over native communities depended heavily on the explorer being able to 'take on' the identity of the native;²⁵¹ that mastery over foreign land translated into mastery over a foreign identity. Narratives of this sort bring to the forefront issues related to the possibility of *disembodied* identities – identities that are independent of the historical and psychological continuity of embodied experience. This 'hijacking' of native identity was the result of many voyagers being convinced that cultural identity could be adopted through the cursory practice of learning a particular language or being accustomed to certain traditions, or simply by living in isolation amongst a cultural group for several months or years. In some instances the European acquisition of non-European linguistic and cultural traditions was perceived as marking a break in native history, whereby the European was understood as *rescuing* a decaying culture by Europeanising it. As Singh eloquently explains:

²⁴⁷ From Buxton's logbook related to the survey of Orissa in British India. See, "Account of the Operations of the Great Trigonometrical Survey of India: Descriptions and Heights of Bench-Marks on the Southern Lines of Levelling," ed. S.G. Burrard (Dura Dun: Office of the Trigonometrical Survey of India, 1910), p 19.

²⁴⁸ Alexander von Humboldt as quotes by Mary Louise Pratt. See, Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (New York: Routledge, 2007), p 24.

²⁴⁹ I discuss this in much greater depth in Chapters 3 & 4 of the thesis.

²⁵⁰ For instance, through the discourse of tropicality. See, David Arnold, *The Tropics and the Traveling Gaze: India, Landscape, and Science 1800-1856* (London: University of Washington Press, 2006).

²⁵¹ For example, Curzon's policy in India was that political agents 'become Indian', by learning the language and cultural traditions. Also see, Simon Dalby, "Global Environment/Local Culture: Metageographies of Post-Colonial Resistance," *Studies in Political Economy* 67(2002): p 64

Learning Indian languages and forming the Asiatic Society of Bengal, for example, they [the British civil servants] attempted to recover India's classical past as a golden age, while setting it in contrast to images of disarray and decadence of a 'fallen' eighteenth century India – an India that had, in effect, corrupted the moral rectitude of the Company officials.²⁵²

From Singh's analysis we see a European preoccupation with rediscovering native cultural purity, unsullied by political and economic development. This fixation in creating distinct and separate cultural communities all but disappears from the colonial to postcolonial transition. As I illustrate in Chapter Three, this search for an untainted and authentic native culture has also become an obsession of liberal law and its processes of legal recognition of cultural minorities.

Witnessing narratives rely heavily on the experiences of the European body. Bodily emplacement has been described by authors like Merleau-Ponty as crucial to spatial experience.²⁵³ In physical space the body and sight are often the first points of identification and sites of interaction between people. We can identify this quite clearly in the earlier passage where Columbus interpreted an entire dialogue between himself and his native visitor through bodily gestures. Therefore, to suggest that identity is independent of bodied experiences is to, in fact, desocialise and dehistoricise cultural identity; it is to suggest that the pain and happiness of the past, much of which have marked the body through physical experiences of violence and pleasure, have no influence over how we perceive and understand our sense of self and our relationship to others. To make the claim that European intervention is necessary to 'recover India's classical past as a golden age' is to point to the superficiality of identity, it is to extract Indian identity from the body of the Indian and to hold it up as having some objective reality of its own. This then suggests that Indian identity is fixed, static, and that it lacks human agency.²⁵⁴

More interestingly, however, in assuming native identities, European Imperialists problematise the surveilling and disciplining of the body and identity in physical space. Embodying a native identity displaces threats to the European body in non-European space. The European explorer becomes banal, altruistic, and 'culturally sensitive'. He is able to more readily critique the native body, psyche and behaviour because he appears as 'one of them', as someone willing to embrace and learn about the more primitive culture, embracing all its idiosyncrasies. However, in his hybridity – possessing a cultural identity that is neither authentically European nor native – the

²⁵² Jyotsna G. Singh, *Colonial Narratives Cultural Dialogues: 'Discoveries' of India in the Language of Colonialism* (London: Routledge, 1996), p 3.

²⁵³ Maurice Merleau-Ponty, *Phenomenology of Perception*, trans. Colin Smith (Delhi: Shri Jainendra Press, 1996).

²⁵⁴ As I show in Chapter Three, these ideas become more salient when States begin to demand that groups claiming accommodation demonstrate the fixity of cultural identity and point to a continuity of cultural practice. Non-European cultural identity is reified, and gives rise to forms of governance that require it to remain static if groups are to be accorded specific rights of autonomy.

explorer is, at once, revered and threatening; perceived as the bastion of European culture, but suspected as being in a constant state of defection.²⁵⁵ From this reading of hybridity, coupled with the European obsession with rediscovering and protecting the authenticity of native culture, suggests that the processes through which territory emerges are, intrinsically, fearful of human miscegenation and any degree of intermixing (institutional, cultural, social), which could destabilise European claims to cultural superiority. Territory, therefore, can be attributed to European quests for maintaining a level of cultural integrity which could allow them to speak, not only on behalf of native peoples, but *for* native peoples.

ii. *Foreign Geographies as Sites of European Identity-Formation*

Apart from foregrounding native identity, colonial geography also served as an important site for the formulation of the European sense of self. Through the tropes of discovery and rescue, the European was constructed as a civiliser, a saviour that would transport the native from barbarism to civilisation. This was evident in the narratives that saw the European bringing Christianity to foreign spaces and places, and those accounts that spoke of European schemes for industrial and agricultural development and the worth of these ventures to the barren, desolate spaces of native settlement.²⁵⁶ Merchants writing about the exploitable wealth of colonised space speak of the potential that these lands have for increasing “their own nation’s ‘strength, wealth, and treasure,’” and they often had the tendency to iterate these advantages by “collapsing all of the ‘Nations of the Eastern World’ into a single source of rich wares.”²⁵⁷ The native becomes nothing more than the exploitable wealth of the geography he inhabits.

But it is not only the *content* of the narrative that disparages the native. In relaying geographic and cultural experience in the form of a monologue these accounts represent a univocal

²⁵⁵ There are also many examples of colonists rejecting the growing frequency by which liberal ideals led European officers to manage native populations with greater leniency, suggesting a mistrust of those practices which humanised native peoples. For instance, the Earl of Pembroke in 1870 opines for the “good old times of Conquest and Colonisation,” when “the civilised nations of the day...maintained that it was the savage’s business to understand and conform to their notions, and not their business to regard the savages.” Earl of Pembroke as quoted by Jane Samson. See, Jane Samson, *Imperial Benevolence: Making British Authority in the Pacific Islands* (USA: University of Hawaii Press, 1998), p 2-3. This is also an idea projected through Young’s work on ‘colonial desire’ and the sexual allure of racial miscegenation and hybridity. In Young’s reading of the colonial encounters he suggests that the Anglo-Saxon racial identity remained proudly ‘hybrid’ or ‘mongrel’. See, Robert J.C. Young, *Colonial Desire: Hybridity in Theory, Culture, and Race* (London: Routledge, 1995). Young’s interpretation of the colonial preoccupation with the relationship between pleasure and hybridity has also been drawn on by Haldar, who suggests that Occidental law has (and continues to be) focused on moderating experiences and expressions of pleasure. See, P. Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (London: Routledge Cavendish, 2007). Haldar’s work is particularly relevant to many of the key debates being presented in this thesis, in the sense that he traces a connection between the obsessions which informed colonial experiences of cultural difference and later legal and political developments.

²⁵⁶ Irving A. Leonard, ed. *Colonial Travelers in Latin America* (New York: Alfred A. Knopf, 1972), p 148-9.

²⁵⁷ Jyotsna G. Singh, *Colonial Narratives Cultural Dialogues: ‘Discoveries’ of India in the Language of Colonialism* (London: Routledge, 1996), p 26.

construction of native and European cultural identity. By foreclosing dialogue, most travel writing denies subaltern agency and subjectivity by excluding the native's self-perception and reducing him to an inactive feature of the scenery. As the foreign land is portrayed through the use of the "discovery motif of finding 'treasures/commodities' to which the English had both natural and moral claims,"²⁵⁸ the peoples inhabiting these areas becoming nothing more than landmarks of a space perceived to exist for the purpose of European consumption and exploitation.

But, as scholars interested in Orientalist discourse argue, in their representation of Oriental identity and personality, the Occident reveals more about himself than he does about the Other. As Haldar states, "[t]he relationship between East and West has been structurally maintained so that the East performs a transgressive function necessary to the constitution of Occidental legality and subjectivity."²⁵⁹ Native identity and personality is constructed in reference to the preoccupations and anxieties that informed the viewer's own self-identity as someone that is, temperate, moral, patriotic, and industrious. His focus is, therefore, directed *not only* at identifying and recording those practices and behaviours that diverge from his own, but at attaching to those modes of conduct, attributes and personalities that run counter to his self-definition. The viewer's function, at least the way he imagines it, is to curb those behaviours, to 'tame' the native, so that he becomes less unlike the voyager. At the same time, this is a form of being that is entirely unattainable for the native because the native must exist as an *inferior* in order for the voyager to exist in the way that he imagines himself to be.

Space operates to contain identity by fixing it. While human behaviours, motivations, sensibilities may shift, geography remains stable, unchanging, unyielding. By drawing on the familiar to distinguish and describe unfamiliar landscapes, Imperial witnessing narratives establish European identity by comparing European and non-European space. Particularly when the readership is European, these narratives immediately invoke a sense of wonderment because, they at once, reveal something *new* and *exotic* by, simultaneously affirming the old and familiar. We know who *we are not* by knowing who *we are*. In their stabilisation of the complex, multidimensional and consistently evolving nature of human identity Imperial witnessing narratives were not merely accounts of the distant, bizarre and peculiar, but signified powerful reaffirmations of what being European was all about.

²⁵⁸ Ibid., p 27.

²⁵⁹ P. Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (London: Routledge Cavendish, 2007), p 2. It is important to note that Haldar's use of Occidental Legality is different from my use of term.

D. Temporalising Geographies of Difference

The re-writing of history was a key component of the European response to the Imperial-Indigenous encounter, and narratives of Imperial witnessing often had the effect of positioning natives at the heels of European modernity. Earlier in this chapter I discussed how maps reflected intricate details to mark European arrival and gave the impression that legitimate attempts had been made to 'modernise' these places. In leaving entire areas of the witnessed space unmapped, European cartographers gave the impression of an undeveloped pristine wilderness, which worked to foster the notion of a socially empty space, and later helped to reinforce claims of possession *via* the doctrine of *terra nullius*. But ethnographic accounts, in transmitting stories of native wantonness and bestiality, were also important ways in which foreign geographies (and its occupants) were temporalised.

i. *The Re-writing and Erasure of Native History*

Imperial witnessing involved not only the recording of cultural traditions and native behaviour in the form of ethnography, but also the re-writing of native history through the European imagination. In his witnessing of the trans-Pacific voyage from the Philippines to Mexico, Italian voyager, Giovanni Francesco Gemelli-Careri, describes the Indigenous inhabitants of the Mariana Islands as embodying inhuman features, suffering from incapacitating superstitions, and notes that "[b]efore the coming of the Spaniards they lived under a chief, naked, wandering about the mountains. They knew not what fire was, or the use of iron...There never was, nor is there at present, any selling among them, but only exchange;"²⁶⁰ From these accounts we are given the impression of a history 'stood still', marked by native heathenness and aimlessness, a society characterised by a lack of social, political, and economic organisation. Gemelli-Careri's witnessing narrative thus invokes admiration for the Imperial enterprise, a project that led to the *civilisation* of these communities. The Spanish were understood to have brought the natives out of their self-imposed ignorance by introducing religion and commerce. Thus, not only was this tale of witnessing a *political* narrative, entailing the measurement of native development and organisation through the use of European referents, but also a *moral* narrative in which native-life is understood as being deficient and passive.

Many of these narratives produced a vision of geography 'unfolding' before the traveller's gaze, with "points along travel routes correspond[ing] to moments within a sequence of events."²⁶¹ Since the witnessing of an event required the voyager to *be there* to observe them, these events

²⁶⁰ Irving A. Leonard, ed. *Colonial Travelers in Latin America* (New York: Alfred A. Knopf, 1972), p 148-9.

²⁶¹ Laura Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (New York: Cambridge University Press, 2010), p 16.

became intrinsically temporal within the European social imagination. As ethnographic representations were largely written in the form of a monologue, the observer became both the starting- and focal-point of these accounts. Benton refers to this witnessing of space as a lens through which events were filtered and interpreted as 'travelling epistemologies' and describes it as a condition in which "knowledge becomes collapsed with movement through space", where 'naming' events and spaces produces that space as a reality, as a *fact*, precisely because it becomes identifiable.²⁶² But more importantly, it gives the impression that the space did not exist prior to the act of naming it, prior to it being witnessed by the European.

ii. ***The Fluidity of Space and the Potential for Native Civilisation***

For some authors the Imperial-Indigenous encounters significantly transformed understandings of evolution. Within these accounts the fluidity and mutability of nature takes root. As Gerbi asserts, the colonial encounters in the Americas – through tropes of 'immaturity' and 'degeneration' - replaced the "biblical and Aristotelian tradition [of]...the fixity of the species, nature as immobility, or as variety fully unfolded in space, unmarked by the 'silent and unending march of time.'" These categories, though they represented native Americans as infantile and uncivilised, were nonetheless important precisely because "they left some hope for the future, or at the very least, in insisting on an irreversible degeneration, cast a ray of light on the continent's remotest past."²⁶³ Nature is further brought to life in later accounts of travel, particularly Vitoria's work, where natives are understood not as a 'degenerate' class, but as an immature class that have the potential to reach European standards of morality and politico-economic development.²⁶⁴ In these narratives the native does not inhabit a separate temporal or historical domain, but occupies a position that is located earlier along the same historical trajectory.

In some cases, it was argued that European expansionism and settlement in non-European places provided an even greater impetus to engage in ethnographic and travel writing. Arnold explains that as the British "began to exhibit a new sense of ownership toward India...It became common for travel writers to justify their accounts in terms of a need for the British public to know more about our 'Eastern Empire'...stress[ing] the value of first-hand experience of

²⁶² Ibid., p 16-7. Particularly in the early periods of Spanish conquest 'naming' was a particularly important aspect of the cartographic process. See, Barbara E. Mundy, *The Mapping of New Spain: Indigenous Cartography and the Maps of the Relaciones Geográficas* (Chicago: Chicago University Press, 2000), p 29, 34-5.

²⁶³ Antonello Gerbi, *Nature in the New World: From Christopher Columbus to Gonzalo Fernandez De Oviedo*, trans. Jeremy Moyle (Pittsburg, PA: University of Pittsburg Press, 1985), p 3.

²⁶⁴ Antony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law," in *Laws of the Postcolonial*, ed. Eve Darian-Smith and Peter Fitzpatrick (Ann Arbor: University of Michigan Press, 1999).

India.”²⁶⁵ Witnessing narratives, in this sense, worked to *circulate* knowledge about colonies. But it was a very specific body of knowledge that was being disseminated, fashioned primarily around British interests and preoccupations. For instance, advancements in travel, particularly locomotives replacing the man-drawn palanquins (see fig. 2.4) made the chronicling of Indian countryside far less attractive for European travellers and scientists. Thus, in the later periods of Indian colonialism (nineteenth century), witnessing accounts tended to focus on urbanised geographies and bustling cities. As stations on the railroad network were largely located in urban centres, European writers were more likely to bypass areas and communities located at a distance from the nearest station. Not only did this limited level of focus widen the theoretical gulf between the urban and rural areas of the subcontinent²⁶⁶ - suggesting that it was the urban areas that had greater epistemological value - but the absence of the more remote areas from the European historical record had the effect of erasing their existence all together.



Figure 2.4 Human-drawn Palanquin Used for Travelling during the Earlier Periods of British India – Retrieved from: http://delhidiary.in/whats-new_detail.php?wid=nGw

The proliferation of European power throughout British India, coupled with the advancements in travel brought about through the railroad, led to a more stringent ordering of colonised space. Railroad networks linked centres of trade throughout the subcontinent and virtually transformed existing conceptions of distance and remoteness. At the same time, however, the railroad significantly shaped emergent economies, creating both material and conceptual divisions between commercial centres and ‘the wilderness’. This, in turn, had an enduring impact on the ruralisation and urbanisation of geographic area, and had the effect of widening economic and political inequalities between differently-located communities.²⁶⁷ The previously unanticipated divisions of space that these technologies either brought about or

²⁶⁵ David Arnold, *The Tropics and the Traveling Gaze: India, Landscape, and Science 1800-1856* (London: University of Washington Press, 2006), (2006), p 12.

²⁶⁶ Ibid., p 20-1.

²⁶⁷ Michelle Burge McAlpin, "Railroads, Prices, and Peasant Rationality: India 1860-1900," *The Journal of Economic History* 34, no. 3 (1974).

compounded,²⁶⁸ coupled with a growing belief in the European *ownership* of geographic area and the new relationships that came about as a result, had a tremendous influence on the structures and forms of governance that emerged within these areas and between these communities. As a consequence of these technological advancements, the focus of Imperial cartography shifted to identifying not *strange and unanticipated landscapes*, but *modernised and possessed territory*.

Cartographic processes served to further broaden the disparities between the rural and urban areas. In flattening spatialities and presenting them as discontinuous formations, Imperial maps were a superficial representation of the colonial experience that failed to capture and convey relationships of power. As 'objective' blueprints of 'existing' geographies, these maps concealed exploitative relationships by presenting urban and rural geographies as pre-given, static, and passive spatialities. They neglected to report on how industrial centres may, themselves, have been underwritten by experiences of extreme exploitation and violence, and how they may have emerged through a degradation of the colonised populations' environment.²⁶⁹ In mapping European centres of activity with precision, and making other areas minimally distinguishable, cartographers were able to guide the interest of the reader. Readers of the colonial map become less interested in the ambiguous and obscure spaces which may have, nonetheless, been important sites of alternative histories.²⁷⁰ Furthermore, in maps providing demographic information – such as population density, the religious/age/gender breakdown of the inhabitants, and the distinction between hostile and friendly villages²⁷¹ – maps had the effect of heightening anxiety by making visible the class and ethnic distribution of colonised spaces.²⁷²

²⁶⁸ Sometimes through their involvement in producing agricultural technologies triggered by the emergence or availability of new markets. See, David Arnold, "Europe, Technology, and Colonialism in the 20th Century," *History and technology* 21, no. 1 (2005): p 90-1.

²⁶⁹ Cynthia Radding, *Wandering Peoples: Colonialism, Ethnic Spaces, and Ecological Frontiers in Northwestern Mexico 1700-1850* (United States: Duke University Press, 1997), p 2.

²⁷⁰ For instance, Bassett notes that sometimes maps were left blank so as to keep areas of European commercial and strategic interest a secret. See, Thomas J Bassett, "Cartography and Empire Building in Nineteenth-Century West Africa," *Geographical Review* (1994): p 322-3. Or Safier notes, imperial rivalries in the region may give rise to disputed geographies. Or, in other cases, European mistrust may have led to a lack of reliance on native witnessing. See, Neil Safier, "The Confines of the Colony," in *The Imperial Map: Cartography and the Mastery of Empire*, ed. James R. Akerman (Chicago: University of Chicago Press, 2009).

²⁷¹ Thomas J Bassett, "Cartography and Empire Building in Nineteenth-Century West Africa," *Geographical Review* (1994): p 319. For instance, Mundy quotes Imperial agents who argue that the names of certain places are unimportant, even though "the Indians have given names to all of them" for the work that the Spanish are doing in the New World. See, Barbara E. Mundy, *The Mapping of New Spain: Indigenous Cartography and the Maps of the Relaciones Geográficas* (Chicago: Chicago University Press, 2000), p 34.

²⁷² As Carroll notes, the growing urban centres of colonial Mexico led to an envelopment of Indigenous groups that once resided outside these areas. As these spaces became more heterogeneous it became difficult to distinguish Indians from non-Indians. Colonial map-making was an important aspect of articulating the fast-changing racial/ethnic dynamics of colonial space, drawing attention to a growing intermixing between European and non-European communities. See, Patrick J. Carroll, *Blacks in Colonial Veracruz: Race, Ethnicity, and Regional Development* (Texas: University of Texas Press, 2001), p 9-10. As I show in Chapter Three, racialised/cultural enclosures are a particularly valuable strategy for making visible the presence of cultural difference even today in terms of the

European cartography, as such, made ethnic and religious distribution more salient, enticing European settlers into the less densely populated suburbs in some instances,²⁷³ or the more politically and commercially rich centres which provided colonists with “ready-made bases of power.”²⁷⁴ The geographic space, in this way, was imagined and ‘performed’ as culturally-divided places.

6. Conclusion: the Social Production of Territory

Much of this chapter has focused on the different ways in which European travellers and voyagers came to terms with the newness of distant places through the application of what was familiar. Nonetheless, such documentation and study of the environment was not merely a way in which European travellers conveyed information about the bizarre and exotic, it was a way in which they were able to shape interactions, events, and social phenomena. Manipulations of geographic space made it possible to regulate (and conceal the regulation of) Imperial-Indigenous interaction. Geography, as such, became a representation of European power. It laid the groundwork for the legal and political machinery of colonial law and justified its jurisdictional reach upon the conquered peoples of these regions.

Imperial map-making was essential for drawing attention to specific spaces, while making others invisible. Cartographers were able to guide the viewer’s attention to particular places by adding greater detail and colour-coding the map. In naming spaces and creating visual representations of sharply divided and bounded geographies, these maps give the distinct impression of ownership and possession. In being widely-accessible records of European experience, Imperial maps have tremendous epistemological value. Yet, they are a highly visible, extremely political representation of reality that has been made available for mass consumption. Maps give the impression that spaces can (and should be) differentiated, separated and distinguished from one another. Cartographic processes are shot through with relations of power, in which “whole ways of knowing and seeing, magnifying and displacing the

ghettoization of neighbourhoods inhabited by a particular ethnic or religious group and the development of the Aboriginal Reservation system. The racialised ‘ghetto’, in some instances, is both a strategy of ‘containing’ racialised Others as well as projecting their hostility. Related to this, is also the formation of, what Marcuse refers to as ‘fortified citadels’, the parallel construction of upper-class neighbourhoods and residences meant to insulate the ‘included’ from the dangerous environment beyond. See, Arnold R Hirsch, *Making the Second Ghetto: Race and Housing in Chicago 1940-1960* (Chicago: University of Chicago Press, 2009). Also see, Peter Marcuse, “The Ghetto of Exclusion and the Fortified Enclave New Patterns in the United States,” *American Behavioral Scientist* 41, no. 3 (1997).

²⁷³ Meera Kosambi and John E. Brush, “Three Colonial Port Cities in India,” *Geographical Review* 78, no. 1 (1988): p 33-4.

²⁷⁴ Patrick J. Carroll, *Blacks in Colonial Veracruz: Race, Ethnicity, and Regional Development* (Texas: University of Texas Press, 2001), p 6.

tensions and anxieties of the expansive societies"²⁷⁵ had the effect of *producing* cultural knowledge about the places and populations being witnessed. Through the Imperial map we are able to 'locate' social difference; we are able to identify places of 'European' enterprise (e.g. highly detailed centres), and point to spaces of native 'impoverishment' (e.g. blank spaces on the map). The specifics of the Imperial map tell us about the rectitude of culturally diverse communities and this was very powerfully conveyed through the aesthetics of mapping, where the inclusion of ornate cartouches conveyed European benevolence and righteousness.

Narratives of Imperial witnessing also had a similar effect. Tropes of European discovery and the associated imagining of Imperial-Indigenous dialogue not only suggested European possession and ownership of foreign land, but legitimated that possession through native invitation. In comparing geographies of the pristine wilderness against humanised landscapes of European enterprise, these narratives communicated European industriousness and reproduced sharply divided spaces as markers of cultural difference. In this way, witnessing accounts did not merely *record* cultural difference, but *produced it*. In cataloguing these differences in landscape, fauna, climate, and terrain, witnessing narratives easily "enabled the establishment of detailed typologies of geographical, cultural, and moral categories, [which] in turn, became a crucial aspect of the project of colonial meaning-making from the earliest European encounters."²⁷⁶ Frequently these testimonies blended myth and reality, 'fact and fiction', and the geographies and identities they constructed were developed in relation to, and against, European conceptions of their own cultural superiority. As repertoires of cultural 'knowledge', eyewitness testimonies represented both experiences and observations, as well as incorporated personal "social, political, or moral commentary."²⁷⁷

In using the discourse of tropicity witnessing narratives emphasised corporeality by presenting the foreign climate and ecology as a threat to the European body. Against such a construction of decay and pestilence, the native body – accustomed to these conditions – becomes diseased. At the same time, those witnessing narratives that conveyed the potential that Europeans had for recovering an illustrious native past that had fallen into disarray as a result of native decadence, brought cultural difference into sharper focus by juxtaposing the static, diseased and corrupt body of the native alongside the European capacity for regeneration

²⁷⁵ Ricardo D. Salvatore, "North American Travel Narratives and the Ordering/Othering of South America (1810-1860)," *Journal of Historical Sociology* 9, no. 1 (1996): p 88.

²⁷⁶ Jyotsna G. Singh, *Colonial Narratives Cultural Dialogues: 'Discoveries' of India in the Language of Colonialism* (London: Routledge, 1996), p 28-9.

²⁷⁷ Ricardo D. Salvatore, "North American Travel Narratives and the Ordering/Othering of South America (1810-1860)," *Journal of Historical Sociology* 9, no. 1 (1996): p 86.

and evolution. The native becomes tied and locked into the body, while the European appears able to eschew his corporeality, and all the limitations that it poses.

In turn, these tropes of discovery and tropicity provided Europeans with a privileged epistemological position. As discoverers of 'new knowledge', Imperialists often circulated these ideas "via intractable binarisms: civilisation and barbarism, tradition and modernity, and Christianity and heathenism, amongst others."²⁷⁸ Through Imperial correspondence and European travel writing we can see a certain convergence between experience and epistemology. With cultural knowledge being mapped onto geographic space, 'territory' – as an Imperial appropriation of space - becomes a progressively more rational formulation of geographic area.

Through these various processes European travellers and political agents were able to control and regulate Imperial-Indigenous interaction. Far from being 'anti-conquest'²⁷⁹, "innocent interpreters of nature," travel writers and cartographers were thoroughly implicated in the practice of "colonial dispossession even when there were not, themselves, agents of the colonising nations."²⁸⁰ In presenting space as sharply divided, discontinuous, bounded, and culturally-divisible, cartographic and ethnographic processes were crucial for the positioning of conquered populations as morally and culturally inferior. In this way, European voyagers were able to legitimise native dispossession and subjugation. In focusing on the geography of foreign lands, rather than its people, these narratives gave the impression that it was the space *and not people* that were doing the controlling. Through these practices, geographic space was emptied of its normative content and reconstructed by reference to European history.

In reproducing the wide-open space as discrete, apportioned, and owned place, Imperial maps were able to 'contain' identity. Geographic space fixed the personalities and characteristics of native people, allowing those doing the controlling to immobilise "the trajectories of others...while [they] proceed with our own."²⁸¹ Additionally, in *locating* social difference within geography (in racialising space), maps and ethnographic accounts helped to also contain the native body. We were able to identify difference through identifying the spaces in which it occurs. The racialisation of space also helped to create distance between communities coming

²⁷⁸ Jyotsna G. Singh, *Colonial Narratives Cultural Dialogues: 'Discoveries' of India in the Language of Colonialism* (London: Routledge, 1996), p 2.

²⁷⁹ Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (New York: Routledge, 2007), p 9.

²⁸⁰ Leonard Guelke and Jeanne Kay Guelke, "Imperial Eyes on South Africa: Reassessing Travel Narratives," *Journal of Historical Geography* 30(2004): p 12.

²⁸¹ Doreen Massey, *For Space* (London: Sage, 2005), p 8.

into contact with one another for the first time, and thus reduced the fear of 'black and white bodies' touching one another.

This chapter, however, explains only one part of an interdiscursive mapping of social difference and the exercise of European cultural hegemony through geographic domination. At the beginning of this chapter I suggested that Chapter Two and Three be read as a *narrative of Occidental Legality and its production of territory*. While European cartographic and ethnographic processes clearly reveal an Imperial impulse to spatialise power, and though they certainly give rise to an organisation of space that we, today, describe through the label of 'territory',²⁸² this vision of space has acquired greater relevance through its institutionalisation and formalisation. Therefore, when I use the term 'Occidental Legality' I am referring to a model of regulation, an ordering of law, that incorporates these visions of space and attaches *consequences* to them; consequences that manipulate and shape social and political action. Thus, the concept of territory has a social and imagined component, a connection that I revealed through this chapter. It also has a political and legal component. 'Territory', as a 'political way of conceiving land', is the product of Occidental Legality, and in the next chapter I will further discuss this relationship between 'the spatial' and 'the legal' by analysing how territory is produced and reproduced through legal discourse and structures of governance. The endurance of territory as a socio-political construct has, as I show in Chapter Three, survived the colonial to postcolonial transition.

²⁸² By which I mean space as apportioned, divided, enclosed, bordered, and culturally-divisible.

Chapter Three

The Political and Legal Construction of 'Territory'

Occidental Legality and the Colonial to Postcolonial Transition of Space

1. Introduction

In this Chapter I continue the narrative of Occidental legality and demonstrate how 'territory' is excavated through a merging of the narratives that were developed during the first Imperial-Indigenous encounters, with structures of political and legal governance as they materialised in European colonies. I argue that the processes of Occidental Legality are able to better conceal a contentious politics of difference-making when a territorial vision of space acquires widespread political acceptance and legal reinforcement.

The notion of territory exhibits a dialogical relationship between law and geography, what Delaney refers to as the 'spatio-legal'.²⁸³ In this relationship, geography represents a setting for the encoding of legal ideas, and works to mask the unequal application of the law to different communities. Similarly, law acts as a framework through which cultural geographies – geographies that are underwritten by race, ethnicity, and religion – are constructed, legitimated, and rationalised. In the first section I analyse how law and geography manipulate and shape one another during the early periods of colonialism. In the second section I examine how postcolonial law and structures of governance reproduce space as bounded, owned, and culturally-divisible.

What is interesting about the juxtaposition of these two stages is the fact that, while the colonial setting demonstrates a fluid arrangement of legal orders, with religious and indigenous normative systems often operating side-by-side, this is certainly not the case in the postcolonial setting. As law becomes hierarchically organised, with State-law operating 'above' other indigenous normative systems, pluralistic systems are structured through State law's authorisation and legitimation of indigenous legal systems.²⁸⁴ The reality of colonial-native relations casts doubt on the claim that a hierarchical system of law-making is necessary for the smooth functioning of society. As Benton's work on legal pluralism clearly demonstrates, the

²⁸³ The 'braiding' of law and geography to create specific realities that depend on the two categories being inseparable from one another. For Delaney this reality is our 'nomosphere'. See, David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making* (Abingdon, Oxon: Routledge, 2010), p 23.

²⁸⁴ Lauren Benton, "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State," *Comparative Studies in Society and History* 41, no. 3 (1999): p 563-86.

simultaneous operation of colonial and indigenous systems of law was conducive to the maintenance of social order within colonised territories.²⁸⁵

My method of employing a historical and critical legal perspective becomes valuable for demonstrating the persistence of Occidental Legality since the first Imperial-Indigenous encounters, to contemporary ways in which colonial societies manage issues of cultural and legal pluralism. While the initial impulse to spatialise power became quite visible during the early years of the European expansion, it is now understood as a 'rational' and natural way of ordering political and social relationships. In this Chapter I evaluate how dominant and minority communities interact with one another through the notion of territory, and what consequences this has for the protection of minority rights (specifically, Aboriginal rights).²⁸⁶

Territory persists as an optic through which social difference is distinguished, categorised, and ultimately contained. These processes tend to immobilise the histories, identities, and even the bodies of those perceived as Others. If contemporary societies are, as they often claim, interested in protecting the heterogeneous character of their political community, then an understanding of the role of territory in promulgating and justifying racialised politics and violence becomes crucial. Rather than continuing to revere territory, or to accept its presence as a pre-given and passive reality, contemporary societies should become more aware of its marginalising tendencies.

The history of territory is often of less concern to modern political relations (as compared with the discussions of rights and legal jurisdiction). This can partially be attributed to the fact that territory is, for one, understood as an organic setting for social and political action that is simply 'lying there'. It is imagined as a neutral background upon which societies map political and social rules. Second, territory is a representation of how social communities understand and enable political and economic power. It is the product of how multicultural societies arrange their struggles for power against one another.

But this is precisely why unpacking the notion of territory is so crucial. As a symbol of political power, and a representation of an entity's political and legal autonomy, we need to ask

²⁸⁵ Ibid. Also see, L.A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (London: Cambridge University Press, 2002).

²⁸⁶ I want to note right at the outset of this Chapter that when I speak of 'dominant' I do not mean 'European', 'White', or 'Anglo-saxon'. When I say dominant, I simply refer to political elites, groups that hold the preponderance of political, cultural, and intellectual power in any given society. While the previous Chapter discussed the dominance of European travellers and political agents, it is important to note that as difficult and problematic as these categorisations may have been for the discussion of the Imperial-Indigenous encounter, they are far more troublesome to uphold within later contexts of colonialism given the complexity of interactions that characterise colonial relations. Thus, in this chapter I use the terms 'dominant' and 'minority' to connote power relationships similar to 'governing' and 'governed'.

ourselves, *why* territory exemplifies these types of ideas. While it can certainly be argued that the 'land-based' component of territory is essential for sustaining the economic prosperity of social groups, and providing them with the 'space' to exercise their autonomy, this mode of thinking does not capture the full relevance or impact of the notion of territory. For one, it becomes imperative for us to ask *why* groups *need space* for the exercise of authority, why must political and legal jurisdiction be *spatialised*. Benton explains that this 'turn towards' territory may have been perpetuated by a fluid colonial legal order which was easily exploited by indigenous groups. The consolidation of territory as an analytic through which the State was able to define the contours of its own *versus* indigenous legal and political authority, may very well have been an inevitable effect of the playing out of 'jurisdictional politics'.²⁸⁷

Despite the fact that territory may have partially been the product of indigenous action against colonial control, it is still necessary to determine in what ways this emergent analytic works against contemporary challenges to State authority. I submit that one of its problematic effects is that it conceals the presence of hybridity and potential for dialogue, and perpetuates the misconception that the presence of normative diversity necessitates the division of social space as a condition of its fair and equal operation. This view, I argue, is precisely what reproduces the power and importance of territory and other legal geographies that accept its bounded, owned, and culturally-divisible organisation of space.

During the course of this analysis, I draw attention to how spatio-legal discourse is structured through conceptions of social difference and relationships of power. By examining how the law operates through and in space, I reveal how allegedly neutral forms of political and legal ordering are underwritten by judgments of racial and cultural inferiority. In developing this analysis I focus on legal and political sources of governance to analyse how the processes of Occidental Legality produces the partitioning of cultural communities by giving the impression that cultural autonomy ought to equate to territorial autonomy; essentially, that normative communities cannot operate in cooperation with one another, though this is precisely what is happening when one analyses the situation 'on the ground'. This failure to accept interpenetration, I argue, has important consequences for how cultural identities are constructed, and how the agency of minority communities is imagined. Over the course of this chapter I uncover the ways in which contemporary legal discourse and practice works to reproduce the previously discussed effects of Occidental Legality, namely the anchoring of

²⁸⁷ Lauren Benton, "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State," *Comparative Studies in Society and History* 41, no. 3 (1999).

identity and cultural difference in geography, the temporalisation of geographies of difference, and the normative emptying of geographic space.

2. Colonial Possession & the Linking of Legal Regulation to Geographies of Difference

In this section I explore how the later years of the Imperial expansion fixed geographies through the erection of material boundaries and symbols of spatial ownership. As societies previously isolated from one another started to come into greater contact and began to comingle, starker boundaries of separation and symbols of possession became necessary. The development of more visible boundaries was partially undertaken to prevent intermixing between settlers and those perceived as racially and culturally inferior. Additionally, however, these boundaries were also crucial for making visible the prevailing relationships of power. Material boundaries made manifest European claims of ownership over foreign spaces and, by extension, its inhabiting populations.

In this section I also highlight how these representations of space as divided, owned, and possessed, produced new ways of thinking about and structuring Imperial-Indigenous interaction. I draw on Vitoria's work on *jus gentium* in the area of colonial geographies and universal law, and discuss how legal discourse has become an essential representational framework for the encoding of these subjective geographic practices. I argue that, like the other methods of Imperial witnessing that I discuss in Chapter Two, law and political governance are also implicated in the process of translating European experience as neutral and universal knowledge. Consequently, this process brings together the techniques of cartography and travel narratives, with legal and political processes of governance, to show how relationships of power and domination are concealed through the notion of territory.

A. Markers of Colonial Possession

The imagined geographies of the Imperial-Indigenous encounters produced an 'owned' and possessed view of space. This was, as I discussed in Chapter Two, revealed through the tropes of 'discovery', the symbolic gestures of naming places, and the imagining of dialogue and native invitation. These demonstrations of ownership are supplemented by the use of religious symbols and ceremonies, including the planting of crosses, the reading of sermons, and the erection of flags and emblems.²⁸⁸ Occupation of foreign lands takes place through grand presentations of gift-giving and colonial-native communication meant to give the impression

²⁸⁸ See De Vries' accounts of the Dutch presence in the New World. See, Albert Cook Myers, *Narratives of Early Pennsylvania, West New Jersey and Delaware, 1630-1707*, vol. 12 (Barnes & Noble, 1912), p 16. Also see, Margarita Zamora, *Reading Columbus*, vol. 9 (Los Angeles: University of California Pr, 1993), p 16.

that the native *welcomed* the arrival of Europeans and that the possession of colonised land was justified because it was congenial. However, as Europeans began to migrate to and establish permanent settlements in foreign lands, spatial possession is conveyed through less subtle and more restrictive markers of ownership. Greater European (economic, material, political) investment in foreign spaces gives rise to more stringent devices for demonstrating ownership. Soon possession takes the form of building fences, roads, and gardens, all of which exhibit a strong European presence on the land.

The once imagined geographies of divided and temporalised spaces are materialised through the physical apportioning of land into owned plots of property and the building of homes. Markers of ownership are no longer symbolic but have attached to them a whole series of sanctions and regulations that, at times forcefully, defend the claim that ‘this space is taken’. By building and fixing homes, European settlers were demonstrating their “intent to remain,” and claiming an “unassailable [legal] right to own the place [under English law].”²⁸⁹ Alongside the use of space to establish houses and other places of dwelling, were decisions made about the allocation of land to establish the plantations through which settlers would make their living. Colonised space was regionalised through the identification of varying patterns of vegetation, climate, and topography. These features of geographic difference began to take on a political and economic relevance as the environments more suitable to agricultural and industrial development were more readily settled, and became the centres around which the rest of the colonised space was developed. This was expressed most prominently for instance, in the division of the urban and rural, and the designs of townships and cities.

As part of this process of claiming the land, settler societies were structured through forms of social exclusion and regulation. These materialised in the form of fences, gardens, city grids, and roads, all of which carried the weight of ‘the law’ behind them in the way that they were policed, enforced, and defended.²⁹⁰ In some areas this involved the regulation of outside access to, and control over, activities in space. For the Dutch travelling from South East Asia to the New World,

²⁸⁹ The basic underlying premise of property rights under common law. The use of houses and villages to fix settlement and produce title to land, Seed notes, may be a feature unique to English colonists since England (as an Island) lacked contiguous territory to expand into. See, Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (Cambridge, UK: Cambridge University Press, 1995), p 18-9. In Plucknett's history of the English Common Law he explains that the foundations of the law of real property rest on “the growth of land as a commodity with a market value, [which] shows that land...was now the object of intensive exploitation which required the sinking of considerable sums...” This view of land as a commodity is reflected in the settling of land, where material and labour-intensive resources appeared to convert the open space into the owned property of those investing these resources. See, Theodore Frank Thomas Plucknett, *A Concise History of the Common Law (5th Edition)* (New Jersey: The Lawbook Exchange, Ltd., 2001), p 505.

²⁹⁰ Also see, Eve Darian-Smith, “Legal Imagery in the Garden of England,” *Indiana Journal of Global Legal Studies* 2, no. 2 (1994). Also see, John F Hart, “Colonial Land Use Law and Its Significance for Modern Takings Doctrine,” *Harvard Law Review* (1996).

and the Portuguese establishing colonies in America, Africa, and Asia, this meant the construction of heavily fortified trading posts.²⁹¹ Conversely, for the colonists who permanently settled the lands, the policing of space also took on the function of cultural ordering, with garrisons, military personnel, and forts strategically installed between European-settled and native-occupied space. This often had the effect of displacing Indigenous communities and relocated them to less desirable tracts of land.²⁹² Sometimes these demarcations were established through the use of topographical features – like mountains and rivers – which acted as natural barriers to native penetration. As Mar and Edmonds note, “land and the organised spaces on it, in other words, narrate[d] the stories of colonisation.”²⁹³ In these instances we begin to see the designation of cultural spaces taking on a politically-oppressive and economically-depressing character.

These markers became more numerous and gave rise to more restrictive measures and consequences in settler-colonies, where European emigration marked a permanent transition. Typically these colonies were comprised of settlers from the most marginalised social groups in European society (e.g. refugees, convicts,²⁹⁴ or people from lower socio-economic classes), for whom the colony represented a ‘fresh start’ to replicate the societies they left behind.²⁹⁵ In order to ‘make space’ for the newly arriving emigrants, settler-colonies were often underwritten by ideological and legal forms of social distancing, supplemented by widespread violence, aimed at exterminating larger native communities and displacing smaller ones.²⁹⁶

Accordingly, the regulatory machinery charged with protecting and reinforcing these divisions of space was often drawn upon to mediate transgressive performances of space by normative communities who sought to extend, or prevent the extension of, authority into the other’s space. This was meant to ensure that a minimum level of distance was maintained between those

²⁹¹ Gert Oostindie and Bert Paasman, “Dutch Attitudes Towards Colonial Empires, Indigenous Cultures, and Slaves,” *Eighteenth-century studies* 31, no. 3 (1998).

²⁹² Anna Johnston and Alan Lawson, “Settler Colonies,” in *A Companion to Postcolonial Studies*, ed. Henry Schwarz and Sangeeta Ray (Oxford, UK: Blackwell, 2005), p 363. *Also see*, Julie Evans et al., “Imperial Expansion and Its Critics,” in *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830-1910*, ed. Julie Evans, et al. (Manchester: Manchester University Press, 2003), p 24-5. *Also see*, Ken MacMillan, *Sovereignty and Possession in the English World: The Legal Foundation of Empire, 1576-1640* (Cambridge: CUP, 2006), p 121.

²⁹³ Tracy Banivanua Mar and Penelope Edmonds, eds., *Making Settler Colonial Space: Perspectives on Race, Place, and Identity* (New York: Palgrave Macmillan, 2010), p 2.

²⁹⁴ Angela Woollacott, “Political Manhood, Non-White Labour and White-Settler Colonialism,” in *Rethinking the Racial Moment: Essays on the Colonial Encounter*, ed. Alison Holland and Barbara Brookes (Newcastle Upon Tyne: Cambridge Scholars Publishing, 2011), p 75-96.

²⁹⁵ Anna Johnston and Alan Lawson, “Settler Colonies,” in *A Companion to Postcolonial Studies*, ed. Henry Schwarz and Sangeeta Ray (Oxford, UK: Blackwell, 2005), p 362.

²⁹⁶ *See*, Alison Palmer, “Colonial and Modern Genocide: Explanations and Categories,” *Ethnic and racial studies* 21, no. 1 (1998). In Canada and the United States, Aboriginal communities were forced onto Reservations, and Aboriginal children were forcibly removed from their homes and placed in Residential schools. *See*, Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (San Francisco, CA: City lights, 2004).

perceived as a threat to the cultural integrity and political interests of European settlers. Transgressive performances of space, by which I mean the mobilisation of alternative patterns of social and political ordering, were disciplined, regulated, and punished through colonial law. Colonial law managed issues of cultural and social pluralism by producing legal geographies that had the effects of further chaining identity to geography, emptying space of its normative content, and temporalising geographies of difference. Apart from maintaining political stability, I demonstrate how these legal geographies were important for further entrenching cultural difference and regulating identity. Space and law in these instances worked together to conceal the oppressive tendencies of one another. This insidious relationship between law and geography is elaborated in Anghie's reading of de Vitoria's notion of *jus gentium*, which sheds light on some of the colonial sentiments that inspired the move to a universal model of legal regulation.

B. Legitimising Colonial Possession: Vitoria's Notion of Jus Gentium

European Imperial expansion was marked by the duality of economic advantage and political control, expressed through territorial acquisition and the conquest of non-European people.²⁹⁷ The accumulation of geographic space as part of the project of Empire brought with it the application of a uniform system of law, meant to apply to the entire population irrespective of their historical, cultural, and linguistic particularities. This was partly the result of natural law ideologies being replaced by legal positivism and the universalisation of international law as a body of principles "understood to apply globally as a result of the annexation of 'unoccupied' territories..."²⁹⁸

Anghie identifies a problem with this historic shift legal thinking towards universal equality, particularly as it relates back to the processes of colonialism; how could a single regime²⁹⁹ be justified by the colonial project which had spent centuries isolating, dehumanising, and inferiorising non-European places and peoples? In answer to this quandary, Anghie turns to Francisco de Vitoria's rationalisation of the colonial conquests of the nineteenth-century for an interesting illustration of the sensibilities that underwrote European Imperial expansion and which eventually inspired a universal system of international law. Anghie explains Vitoria's

²⁹⁷ Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard international Law Journal* 40(1999): p 1-2.

²⁹⁸ Ibid.: p 2.

²⁹⁹ A regime that Anghie identifies as European primarily because it emerged from European thought and experience. See, Ibid.

reasoning most eloquently in his exegesis of two of Vitoria's most prominent works on *jus gentium* and international law.³⁰⁰

In expanding to the New World, Spanish colonists replaced the culturally divisive religious law of the Pope with the natural law of *jus gentium*, claiming that it was people's membership of the community of men, rather than their identity as Catholics, that bound them to the same laws. By defining New World Indians as part of the same human fabric, Vitoria was able to assert the European *right* to travel and sojourn, and demand that the Indian respect this right by permitting European access to their land so long as they did not harm the native communities encountered over the course of their travels. This right of travel was a reciprocal right based on the fact that both groups were bound to the same laws as part of their membership of the human community. As Anghie argues, "*jus gentium* naturalise[d] and legitimate[d] a system of commerce and Spanish penetration. Spanish forms of economic and political life [were] all-encompassing because they are supported by doctrines prescribed by Vitoria's system of universal law."³⁰¹

Based on this reciprocal entitlement, any native resistance to European arrival and penetration could be interpreted as an act of war, which would permit Europeans to retaliate in self-defence and thus rightfully expand their territory through conquest. Through his reading of Vitoria's work, Anghie reveals the extent to which law and the principles of sovereignty relied on emphasising the subaltern's membership within the human community, while simultaneously drawing attention to his radically different nature. The subaltern was allocated an ambivalent identity; an identity that was neither *here* nor *there*, but both at the same time, leaving the native open to being incorporated within and excluded from the law depending on the prevailing contexts. The job of the Imperialists, therefore, became one of reforming the cultural difference of the Indian, taming his alterity; their job became one of *Europeanising* the native Other for, purportedly, the 'welfare' of the Indian community itself.

Anghie's critical interpretation of Vitoria reveals the fact that, alongside the pursuit of economic development there emerged a paternalistic tendency amongst European colonists, who began to see themselves as the preservers of native culture; a culture that was, nonetheless, entirely articulated in European terms and through European categories. This tension between the European proclivity for economic progress on the one hand, and its tendency to see itself as the bastion of Indigenous identity on the other, is a persistent conflict that underwrites the

³⁰⁰ ———, "Francisco De Vitoria and the Colonial Origins of International Law," in *Laws of the Postcolonial*, ed. Eve Darian-Smith and Peter Fitzpatrick (Ann Arbor: University of Michigan Press, 1999), p 89-108.

³⁰¹ *Ibid.*, p 95.

development and preservation of colonial (and now postcolonial) political authority. Attempts to moderate challenges and forms of resistance to European economic exploitation of the colony led to the construction of imagined geographies of social interaction, which had the effect of separating the interests of the colonial regime along binaries like the public/private divide. Colonial modernity, therefore, appeared to ground itself in the view that economy and culture were “exclusive, *a priori*, ethico-political arenas.”³⁰² This conception of modernity can, therefore, be seen to underlie the dual conflict of colonialism (and later the postcolonial liberal order), that which is between European economic progress and native cultural protection.

The history of Imperial expansion, as my earlier discussion of colonial markers of possession and Vitoria’s notion of *jus gentium* indicate, is a history thoroughly involved in the spatialisation of social difference. European voyagers went to great lengths to demonstrate that non-European geographic area inspired cultural features and personalities that were *antithetical* to European self-identity. However, in the process of appropriating foreign lands as European territories, there appeared to be a rising consensus that native alterity could be tamed, that the colonisers had a duty to rescue the native Other from his spatially-incurred³⁰³ primitivity. The process of territorialising geographic space, therefore, led to the simultaneous hybridisation of native identity. At the same time, however, it opened up important opportunities for Europeans to foreclose the application of a standardised system of law by pointing to the threat of native resistance. The notion of *jus gentium* misuses the category of universalism by both extending the benefits of a shared system of legal regulation to the natives, yet simultaneously prohibiting its equal application through the invocation of standards that suit European (and impede native) interests. Vitoria’s vision of spatio-legal rule highlights the intuitions that underpin the ageless conflict between stable political rule and perceptions of social difference. His work points to the fact that the ‘humanity’ of native communities has always been open to reshaping based on prevailing political interests, and the idea of territorial integrity has always served a pivotal role in confirming, reproducing, and containing the native’s subaltern identity and masking (or naturalising) power asymmetries.

But, more importantly, Vitoria’s work also points to an irrevocable connection between law, geography, and cultural difference. In particular Anghie’s reading of Vitoria exposes the paradoxes of a law that is at once universal *and* particular, able to bring the native into the folds of humanity, but equally capable of casting him out. Indeed one could argue that the law was

³⁰² Ritu Birla, *States of Capital: Law, Culture, and Market Governance in Late Colonial India* (United States: Duke University Press, 2009), p 3-4.

³⁰³ Which is what we are led to believe through the literary narratives I discuss in Chapter Two, that native primitiveness emerges from their geographic location (i.e. being located a distance from European civilisation and in temperate climates and harsh terrains).

universal in form, given that native communities also had the right of reprisal if their entitlement to sojourn was breached by Europeans. The right of sojourn is one that is presented as being mutual, yet with the knowledge that many of the native communities encountered did not possess the requisite travel technologies that would make the reciprocal exercise of that right practicable. Thus, while the right was universal in substance, it certainly was particularistic in application, and this theme of a universal law applied unequally to the 'culturally different' is a theme that will emerge throughout my analysis in this chapter.

It is these very ideas that I want to draw attention to, how law and geography, as epistemological structures, collude to make certain consequences of social relations invisible to us. This spatio-legal conspiracy is revealed time and again throughout this chapter, particularly when discussing issues of jurisdiction and sovereignty.³⁰⁴ Specifically, I show how jurisdiction and sovereignty are spatio-legal concepts that portray political and legal authority as 'having borders', as being enclosed, and produce the idea that this orientation of power is natural and pre-political. However, this is a view of authority that deflects attention away from the reality of unequal social relations and the uneven application of a purportedly 'universal' regime of law.

Conventionally, the notion of sovereignty emerges to legitimate the extension of a universal system of law to native communities. The sovereignty of any governing authority is also linked to territory, in the sense that one entity's exclusive governing potential is limited only by the presence of another 'sovereign' governing power on the other side of its territorial borders. Sovereign entities are able to restrict access to their territory and regulate movement through their territory. Sovereign power, therefore, is intimately linked to territorial possession and the inability to independently control interactions within one's territorial space significantly limits one's exercise of power. In the following sections of this chapter I use the case studies of colonial India and postcolonial Australia and Canada to help elaborate how jurisdiction and sovereignty are spatio-legal constellations that have the dual aim of regulating social difference while concealing the unequal relationships of power that emerge through a particularist application of an allegedly universal regime of law. A historical approach brings into sharper relief the continuity of the spatialising reflex of colonialism and suggests that the steady operation of Occidental Legality is producing an idea of space that is inextricably linked to the

³⁰⁴ It is beyond the scope of this thesis to delve into an appraisal of these 'artefacts' of the spatio-legal. However, both jurisdiction and sovereignty, as legal concepts and political notions, have a well-developed literature. See, Richard T. Ford, "Law's Territory (a History of Jurisdiction)," *Michigan Law Review* 97, no. 4 (1999). Also see, Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory," *Social & Legal Studies* 18, no. 2 (2009). Also see, Laura Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (New York: Cambridge University Press, 2010). For an analysis of jurisdiction and sovereignty in the context of colonial relations, see, Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788-1836* (Boston: Harvard University Press, 2010).

production of cultural difference. As the notion of territory, and territorial sovereignty, are widely accepted principles in international law and are implicated in the current arrangement of the world order, many of the key debates that I present in this chapter have wider application across contemporary societies, and I demonstrate this connection later, in Chapter Four, when I broadly consider questions of cultural and normative diversity in the contemporary setting.

C. Legal Narratives as Expressions of ‘Imperial Witnessing’

In Chapter Two I discussed how narratives of contact and discovery were important accompaniments of European power during the early years of the Imperial-Indigenous encounters. As encounter-narratives revealing European judgments about the native Other, these narratives provided important insights into the development of the witnessing agent’s own identity. Additionally, narratives of Imperial witnessing were also important mechanisms for coming to terms with the alterity of the foreign setting. This was achieved through the use of fantasy to construct a distorted reality about the landscapes and people being experienced and observed. As such, narratives become important cultural representations of space and place, they are important in not only “position[ing] people in relation to each other,” but also in communicating how “[humans] come into existence...as embodied beings, processing the partial fragments of sensory experience, sorting them into patterns of consequence, patterns of meaning.”³⁰⁵

Since narratives are ways in which we sort, arrange, and produce patterns”³⁰⁶ between different subjective experiences of the world, there is always the possibility of competing narratives surfacing, which contest our arrangement or patterning of an event or phenomena.³⁰⁷ Accordingly, we can also say that narratives have the tendency to ‘moralise’ reality, “that is, to identify it with a social system that is the source of any morality that we can imagine.”³⁰⁸ Counter-hegemonic narratives, therefore, can represent acts of resistance to certain normative frameworks that are rendered universal, neutral and naturalised (through, for instance, the processes of narrating and mapping) by providing alternative sources of morality and by proposing competing interpretations of reality. Accordingly, ‘narrativising’ – the use of narratives as a way of constructing reality – is an important strategy employed by both dominant and peripheral communities in communicating their personal and intimate accounts of history and, in the process, challenging the alternative accounts put forth by others.

³⁰⁵ Hester Lessard, Rebecca Johnson, and Jeremy Webber, eds., *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: University of British Columbia Press, 2011), p 6-7.

³⁰⁶ Ibid., p 7.

³⁰⁷ What Lessard et. al. refer to as a ‘politics of narrative’. See, Ibid., p 13.

³⁰⁸ Ibid.

One way in which conflicting narratives are legitimised is through jurisprudential incorporation. The law is an essential vehicle through which competing accounts of political community and individual and group-identity are authorised and institutionalised as *histories*, a set of “coherent narratives” that “recount events in time, in place, involving specific actors.”³⁰⁹ Thus, judicial decisions are, themselves, narratives which legitimise (or delegitimise) certain interpretations of events, phenomena, and people. As a setting for the production, circulation, and authentication of competing narratives, courts serve an important function in *creating* knowledge. They do this by influencing the epistemological value of certain accounts of history and identity and, in the process they help to shape social relations according to a particular social system or normative framework.

Thus, in the following sections this chapter, I draw attention to how legal discourse and judgments are themselves narratives of Imperial witnessing. Like maps, these legal processes position spaces and histories, enclose and contain identities, and discourse and impede movement and interaction. Through this positioning certain relations are rendered ‘comparable’, while others incommensurable. Rather than a source of objective fact, liberal law (i.e. the prevailing legal regime in liberal societies) is thoroughly implicated in a retelling of Imperial experience, traditionally using European referents of discovery, development, and rescue. That is not to say that legal discourse is not a valuable tool frequently used to deploy counter-hegemonic narratives (just as is cartography and ethnography can be). As we will see, jurisdictional challenges that make their way into the courts often present competing versions of history and sometimes these versions have been successful in the rewriting of dominant narratives. As Chapter Two and Three have been split between, on the one hand, Imperial narratives of cartography and ethnography, and on the other, structures of political and legal governance, it should be made clear that the intention is not to hold law up as an example of some objective truth against which to judge the subjective realities of map-making and travel writing. Instead, the aim is to demonstrate how liberal law is, itself, implicated in the reconstruction of subjective reality as objective truth. The making of space, the mapping of history, the grafting of identity, and their institutionalisation through forms of social regulation, are all important aspects of Occidental Legality, and operate in conjunction to produce an owned, enclosed, and culturally-divisible view of space.

³⁰⁹ Ibid., p 11.

3. Tracing the Idea of Territory through Native-Imperial Conflict in British India

The colonisation of India presented many quandaries for British rule as it was a setting that sat at odds with Europe's colonial project in other parts of the world. Part of this could be attributed to the fact that European interest in India was, first and foremost, sparked by the subcontinent's enormous wealth of resources. Accordingly, Britain's first venture into India came in the form of the British East India Company (BEIC) in 1612, a private trading company that was given wide-sweeping powers by the Crown to make govern, make laws, and transact business with the aim of profiting its shareholders. During Company rule, from 1757 to 1857, the operation of law was haphazard, arbitrary, and loosely patterned to facilitate Anglo-Indian trade without the BEIC taking on too strong of an administrative role.³¹⁰ The primary aim was the maintenance of law and order, rather than a large-scale institutional and ideological overhaul of Indian society.³¹¹

However, this focus shifted as the British Government officially took control of India in 1858³¹², and replaced the private interests of the Company with the territorial interests of the metropole. Several reasons explained the Crown's assumption of control over India, not all of them unfavourable. Crown intervention could partially be attributed to the growing number of complaints against Company officials and English settlers related to violence and injustice against native communities.³¹³ Accordingly, the standardisation of legal procedure that came with the metropole taking charge was partially established in order to hold the settled population accountable for their excessive brutality against Indians. Many authors also argue that the British *Raj* (Crown rule) brought about many positive changes within Indian society. For example, Crown rule brought changes to the educational system in India, restored law and order to a society wracked by civil war, and prohibited inhumane Indian traditions, like the practice of *sati*.³¹⁴

Colonial India personified the dilemmas that had provoked Vitoria to previously advance the doctrine of *jus gentium*. India represented a colonial society, living in territory that was now administered by the Crown, but being simultaneously governed by a whole range of localised

³¹⁰ As Bayly asserts, "taxed and counted like a western European state, but allowed many social functions to be monopolized by groups of Indigenous administrators and landlords." See, C.A. Bayly, *The Birth of the Modern World* (Oxford: Blackwell, 2004), p 259.

³¹¹ M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975), p 56.

³¹² The period of British rule in India from 1858 to 1947 is referred to as the British *Raj*.

³¹³ Nancy Gardner Cassels, "Social Legislation under the Company Raj: The Abolition of Slavery Act V 1843," *South Asia: Journal of South Asian Studies* 11, no. 1 (1988). Also see, Bernard S. Cohn, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989), p 134.

³¹⁴ William J Duiker and Jackson J Spielvogel, *World History, Vol. 2* (Boston, MA: Thomson-Wadsworth, 2007), p 619-20.

legal networks, a plurality that made colonial interactions tenuous and unpredictable.³¹⁵ To complicate these issues further, British India could also be characterised by a degree of cultural hybridity and complex social relations that defied easy classification³¹⁶ and often gave rise to native allegiances that were quickly pledged and just as quickly revoked.³¹⁷ These wavering loyalties challenged the colonial power over the course of its first half-century of rule, which was marked by the bloody Sepoy rebellion in 1857, and the day-to-day tedium of indirect and proxy rule in the most unruly areas of the subcontinent.

In order to administer settler-native relations more effectively, British political agents were encouraged to learn the local languages and immerse themselves in the local culture. In recognising India as a long-enduring and rich civilisation, colonial administrators were quick to note that, while having no overarching central government, India incorporated institutions and functions resembling a State system. India had also further integrated lasting forms of local- and self-governance structures that were deeply embedded in social and political life.³¹⁸ These realities of Indian social and political life meant that India could not be managed in the same way as Imperial colonies elsewhere. This realisation was further bolstered by India's sheer geographic magnitude (making centralised governance highly unlikely) and the size of its population (which made the thought of an Indian revolt all the more disturbing). The administration of India, as Cohn notes, "could not merely be analogised by reference to existing colonial experience." The governance of India demanded innovative legal solutions.³¹⁹

To this end, the colonial response was to administer relations by drawing on English legal norms, but integrating them with Indian cultural traditions and beliefs.³²⁰ For metropolitan statesmen this ability to 'impersonate' the Indian was sometimes a cause for alarm because it was thought to make colonial agents more sympathetic to native concerns or less resilient to

³¹⁵ Bernard S. Cohn, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989). Also see, L.A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (London: Cambridge University Press, 2002), p 132-3.

³¹⁶ Indeed the coloniser/colonised binary has itself been contested by many authors who claim that it simplifies colonial relations in a way that fails to accurately describe the realities of the colonial experience. See, Ranajit Guha, "On Some Aspects of the Historiography of Colonial India," in *Selected Subaltern Studies*, ed. Ranajit Guha and Gayatri Chakravorty Spivak (New York: Oxford University Press, 1988). Also see, Martin Sökefeld, "From Colonial to Postcolonial Colonialism: Changing Modes of Domination in the Northern Areas of Pakistan," *The Journal of Asia Studies* 64, no. 4 (2005): p 943.

³¹⁷ Bernard S. Cohn, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989), p 133..

³¹⁸ Ibid., p 131-3. Although India was recognised as 'having law' it was a law understood as intrinsically different than European law because it emanated from a belief in despot rule. ———, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989), p 138.

³¹⁹ Bernard S. Cohn, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989), p 132. Also see, Douglas M. Peers, "Gunpowder Empires and the Garrison State: Modernity, Hybridity, and the Political Economy of Colonial India, Circa 1750-1860," *Comparative Studies of South Asia, Africa and the Middle East* 27, no. 2 (2007).

³²⁰ Javed Majeed, *Ungoverned Imaginings: James Mill's the History of British India and Orientalism* (Clarendon Press Oxford, 1992), p 9.

native deceit.³²¹ As concern over social disorder abroad and at home mounted, partly on account of heightening Anglo-French tensions,³²² a uniform 'spirit' and system of regulation across the Empire was sought. This meant that, as the aims of British expansion became ideological and territorial, stricter categories of identity and more stringent extrapolations of space became necessary.

A. Ordering Relations through the Public/Private Distinction

One way in which the British tried to manage the simultaneous application of colonial and native law was through the promulgation of the public/private divide, which was a first step in separating judicial punishment from other types of (religious/cultural) sanction. As an imagined geography of difference, the public/private divide segregated and hierarchically organised human interaction into artificial domains, each constructed along different visions of social ordering. While the law of the public domain was seen as "enlarging and safeguarding the freedoms of the individual in the market place,"³²³ the private domain was understood as being interested in restricting 'free' activity for the sake of maintaining the particularistic interests of the community. In this sense we begin to see the public and private domains corresponding to the enduring division in European political rule: that between social regulation and cultural protection.

The British government instituted parallel systems of law, a criminal and civil procedure based on the English Common Law, alongside Hindu and Islamic personal law to administer issues related to caste, religion, limited property law disputes, and family law relationships - "arenas that were understood to constitute Indigenous culture."³²⁴ The classification of issues as either 'private' or 'public' matters were left to the English courts,³²⁵ which made these decisions based on judicial interpretation in conjunction with advice from local *pundits*. Disputes that engaged the common law, prevailing within the 'public domain', would be decided on the basis of the

³²¹ For instance, the Directors of the BEIC believed that the Mughals' granting of *Dewani* (right to collect land revenue) had too easily perplexed company officials who saw the status as recognition of Company sovereignty. See, Bernard S. Cohn, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989), p 134-6.

³²² Javed Majeed, *Ungoverned Imaginings: James Mill's the History of British India and Orientalism* (Clarendon Press Oxford, 1992), p 7.

³²³ David A Washbrook, "Law, State and Agrarian Society in Colonial India," *Modern Asian Studies* 15, no. 03 (1981): p 652.

³²⁴ Ritu Birla, *States of Capital: Law, Culture, and Market Governance in Late Colonial India* (United States: Duke University Press, 2009), p 4. Though, it is important to make note of the fact that in native law within the colonial setting was rarely the law "as set down in the texts but was and is made up of a mixture of rules which include custom." Thus even native law, to some extent, possessed a degree of hybridity simply by being interpreted through the lens of European legality. See, M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975), p 58.

³²⁵ Nandini Panda-Bhattacharya, *Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial Bengal, 1698-1772* (Oxford: Oxford University Press, 2007).

principles of equity and policy. On the other hand, disputes activating the private law domain would be subject to rules 'discovered' through existing customary and religious norms.

By this spatialisation of 'the political' versus 'the cultural' the Anglo-Indian system of law not only cemented cultural difference, but defined cultural practice as inherently *non-political*. Personal laws became static, fixed in space, only subject to certain types of interactions taking place in certain places (the home, the sacred, between the family). In comparison, the public domain was presented as affecting the entirety of the political order, engaging issues that were claimed to effect the entire population (though, in reality, they served the interests of an elite minority).³²⁶

The classification of these interactions along the public/private binary was, of course, the prerogative of colonial courts. Often this produced a distortion of native identity by producing legal categories that did not necessarily coincide with cultural or religious identities.³²⁷ In how the personal laws are organised, we are given the distinct impression that a secular identity is incommensurable with a religious identity. Since the courts were to decide non-religious private law matters using the principles of 'justice, equity, and good conscience', it appears as if religious disputes engaged a law that was, specifically *not* 'just, equitable, and of good conscience' (i.e. Hindu or Muslim law). In this pairing of the common and personal law it appears that each regime has a trajectory that is antithetical to the other. The native identity, therefore, appears janus-faced – incorporating a religious *and* secular component, each incommensurable with the other. The use of personal law, as I discuss in greater detail in subsequent sections, not only obstructed evolutions in native identity but also linked that identity to primitivity by "reversions to long dead or unfashionable conventions."³²⁸

While native law appeared spatially contained through the implementation of an imagined private domain, this sphere was still subject to European legal intrusion. The English reverence of legal positivism permeated the private domain, where issues were decided by reference to scripture, and thus written legal norms were more valued than localised, non-scriptural practice. This, in turn, had a crucial impact on Muslim and Hindu law traditions that primarily relied on convention. Furthermore, the courts also determined that the sources of Hindu law be

³²⁶ One good example of this is to relegate matters of criminality to the public sphere, describing it as an violation of the morals of a society when, in fact, the majority of criminal law violations were property disturbances that disproportionately affected property owners, a very small fraction of the Indian population. See, Sandria B Freitag, "Crime in the Social Order of Colonial North India," *Modern Asian Studies* 25, no. 2 (1991).

³²⁷ M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975), p 58-9. The legal categories of 'Hindu' and 'Muslim' did not always coincide with the religion of claimants. For instance, Jains and Sikhs were legally classified as 'Hindus'.

³²⁸ David A Washbrook, "Law, State and Agrarian Society in Colonial India," *Modern Asian Studies* 15, no. 03 (1981): p 653.

organised hierarchically so that written legislation would trump all reference to important religious texts such as the *dharmaśāstra*.³²⁹ In 1864, British administrators also dispensed with native legal advisors, learning Persian, Sanskrit and Urdu so as to administer the personal laws with a view to adjudicating in ways consonant with English principles and procedures.³³⁰ The traditional division in English philosophical thought between the secular and religious, mapped onto the public/private, was not shared by members of Indian society, many of who saw religion and social life as part of the same ethico-political arena. For many Indians religion thoroughly permeated social life, and this neat division that was inspired by the European Enlightenment had little resonance for the way that Indians understood social relations. This distortion of social behaviour took place through a paradox between proliferating jurisdictions that concealed the fact that one set of legal norms was attempting to regulate or prevent behaviour that the other was promoting and safeguarding.³³¹ As we will see in the following two sections of this chapter, this made colonial regulation in India a messy, often inconsistent, enterprise.

B. Legal Difference Anchored in Cultural Difference

The parallel system of legal regulation implemented in India was predicated on the belief that cultural difference legitimised legal difference, or an unequal application of English Common Law. While Indian colonialism was often projected as a 'rejuvenation' of an illustrious civilisation, the imagined geographies of the public and private suggest that India's history was perceived as very different from and inferior to European civilisation. More than anything, colonial policy and practice in India points to an intense fear of a merging of social and political structures, and the 'spacing' (i.e. differentiating through space) of those relations becomes an important aspect of colonial governance.

The first important misconception of Indian colonialism is the idea that the operation of Anglo-Indian law involved *intermixing*. It did no such thing. Laws operating simultaneously in time were isolated to different spaces and places. The discussion of the public/private divide is one example, but there are other more tangible expressions of this as well. For instance, the British

³²⁹ What Galanter believes was an abandonment of a "living process of Hindu law", and which continues to affect the restoration of Indigenous sources of law-making in India. See, Marc Galanter, "The Aborted Restoration Of indigenous' Law in India," *Comparative Studies in Society and History* 14, no. 1 (1972). Also see, ———, "The Displacement of Traditional Law in Modern India*", *Journal of Social Issues* 24, no. 4 (1968). Also see, ———, "Judicial and Legal Systems of India," in *Encyclopedia of Asian History (Vol.2)*, ed. Ainslie T. Embree and Robin Jeanne Lewis (New York: Charles Scribner's Sons, 1988), p 411. Lariviere references these debates about the legal validity or legitimacy of the *dharmaśāstra*. Also see, Richard W Lariviere, "Dharmaśāstra, Custom, 'Real Law' and 'Apocryphal' smritis," *Journal of Indian philosophy* 32, no. 5 (2004).

³³⁰ Bernard Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton, NJ: Princeton University Press, 1928), p 25-6.

³³¹ David A Washbrook, "Law, State and Agrarian Society in Colonial India," *Modern Asian Studies* 15, no. 03 (1981): p 653-4.

Raj permitted the operation of many forms of localised self-government. It allowed the tribal communities living in locations far removed from the centre of British control to live in accordance with their own customary traditions. These areas were administered by setting up forms of proxy and indirect rule, where *mullahs* and *maliks* took on the dual task of acting as native spokesmen and colonial brokers. The Princely States of India, which were administered through Hindu religious law and had remained autonomous throughout Mughal rule, were also allowed to retain their semi-autonomous status.³³² While these regions of normative diversity were allowed to remain, their power was reined-in by the settled law, which entitled the Imperial power to enact legislation across the Empire, including in the Princely States if it opted to do so. Thus, rather than a right, self-government was constructed as a privilege granted to the conquered by the benevolent colonial power.

In recognising Princely India's rights of self-rule, the Crown was permitting these areas to retain their strong relationship between religion and political authority. However, these areas are then defined as traditional and restrictive because the strong connection between religion and political power suggests that changes to one's religious convictions leads to significant political and economic disempowerment. The actual reasoning for preserving the autonomy of the Princely States (i.e. the fact that they possess a cultural identity anchored in religious political authority) also becomes the basis for their inferiorisation. Against this view of the Princely States, the secular colonial government becomes progressive and liberal. This classification of Princely rule, however, demonstrated a clear distortion of reality given the level of tolerance the Hindu *Maharaja* had shown towards Christian converts living within the Princely States.³³³

An analysis of colonial legal processes reveals how the use of space contributed to colonial misrepresentations of Princely rule, and aided in the production of a more tolerant European identity. In *Dasapa*,³³⁴ the English Court in Mysore, located within Princely India, deprived Christian converts of their citizenship and guardianship rights, claiming that the protective laws of (the more tolerant) British India did not extend to these Hindu *spaces*. The Court thus presented itself as having little choice *but* to decide the case in a way that divested individuals of

³³² Laura Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (New York: Cambridge University Press, 2010), p 238-9.

³³³ Chandra Mallampalli, *Christians and Public Life in Colonial South India, 1863-1937* (London: Routledge, 2004), p 129.

³³⁴ See *Dasapa V. Chikama*, 17 Mysore 324(1894). In determining that the case shall be decided in accordance with neither Hindu Law or custom (as the plaintiff in the case, the father, had converted), but according to the principles of 'justice, equity, and good conscience', the Court found that "the rules of other systems of jurisprudence that a child belongs to his father, and that he should be educated and brought up in the religion of the father, do not seem to apply where the father has done something which the law declares shall sever him from all existing ties [converting to Christianity and thereby divesting the son of his social status by compromising his Hindu pedigree which should be traceable all the way from his great grand-father to his father]."

their right to change their religious beliefs *because* of the space colonial law was operating in. This ruling thus suggested that it was *geography* rather than the law itself that was doing the controlling and giving rise to an unequal and discriminatory application of legal norms. Legal diversity, in this case, was attributed to the cultural division of space. Yet, even in these 'Hindu spaces', where the colonial self-identified as an 'outsider', colonial courts took it upon themselves to be the protectors of Hindu identity and culture. This expressed itself through the ruling in *Dasapa*³³⁵ that disfavoured conversion to Christianity for the sake of protecting the Hindu character of the Princely State. Yet, the courts performed this protective role by juxtaposing the progressive and tolerant modernity of British rule against the conservative and intolerant rule of the Hindu *Maharaja*. In this way, Indians who saw culture and political power as one and the same were cast not only into a separate spatial domain, but a different historical epoch (i.e. back in time). The Princely States became essential to the projection of European modernity because they provided both a tangible 'counter'-reality against which the latter's progressiveness could be confirmed, and an imagined geography by which the illustrious Indian past was chronicled and critiqued through forms of English rule throughout the region.³³⁶

More importantly, however, patterning the operation of law to fit a culturally-divisible view of territory helped to deflect attention away from the fact that the British had always supported Hindu rule and worked to protect it through a series of political actions, including the development of Hindu personal law.³³⁷ The rights of self-government accorded to the Princely States were strategic in the sense that it was hoped that these particularly powerful rulers of the Princely and tribal areas would limit their exercise of power to spaces located at a distance from the settled areas. Self-governance was a way of creating and maintaining distance between those parts of Indian society that posed the greatest threat to European political and cultural domination. Colonial law's preoccupation with space, particularly in preserving notions of *distance* and limiting *proximity* will become all the more clearer in Chapter Four, in which I discuss colonial governance within the North-West Frontier of the subcontinent.

Despite the intention to maintain distance these patterns of quasi-/semi-sovereignty proved difficult for the legal management of conflict within the colony. The entanglements of proliferating jurisdictions became most apparent in cases involving Indian claimants 'resisting'

³³⁵ Ibid.

³³⁶ Dirks charges British colonial rule with maintaining systems of Indian custom in the Princely States without sustaining the social and political processes that informed these traditions and ensured a 'living Hindu law'. This, he claims left 'frozen' a set of structures and thus "arrested some of the immediate disruptions of change by casting them as old and framing them within what looked like old-regime tableaux." See, Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (New Jersey: Princeton University Press, 2001), p 64, 80.

³³⁷ David A Washbrook, "Law, State and Agrarian Society in Colonial India," *Modern Asian Studies* 15, no. 03 (1981): p 653-4.

the unequal application of the law by bringing disputes to the courts which challenged the colonial view that native identity was static and unyielding. For example, in *Madura v. Motoo Ramalinga Sathupathy*³³⁸ and an earlier Privy Council ruling of 1872,³³⁹ it was determined that Hindu custom was only able to override the written legislation if claimants were able to demonstrate a continuous, stable, and coherent usage. This meant that the right to rely on a personal law for the resolution of a dispute that fell within the private sphere depended on the claimant's ability to point to a fixed and unchanging identity. This ruling implied that the private law and thus, by extension, native religious/cultural identity was located 'backwards in time', which meant that the private sphere, as an imagined geography was both culturally-divisible and temporally located. As section (4) of this chapter will demonstrate, this is a view of space that also emerges within postcolonial law and cases involving Aboriginal title.

This fixing of native identity was frequently challenged by cases that brought up the possibility of evolving and active identities. In *Abraham v. Abraham* an Anglo-Indian claimant demanded that the courts recognise the hybridity of identity. The facts of the case involved two untouchable brothers, one of whom who had married an Anglo-Indian woman, who had gone on to become affluent distillery owners. After the death of one of the brothers, dispute over family assets arose between the widow and her brother in-law. In the appeal, the Madras courts tried to determine whether the property in question was part of a 'self-acquired estate' (bringing it within the scope of secular English law), or whether it was of ancestral origin (bringing it under the rule of Hindu law). Interestingly, however, an unequal application of colonial law was masked by reference to property. According to the reasoning of the English Court it would be the pedigree of the *property* in question which would determine the type of law that would be applied to the case, rather than the specific actions and customs of the parties involved.³⁴⁰ Over the course of the trial, the Court relied on witness testimonies that used very superficial features of 'Englishness' to formulate a uniquely 'East Indian' identity, that represented an 'in-betweeness', as something less than European but more than Indian. *Abraham*, along with many other inheritance cases that drew on Anglo-Hindu laws of succession significantly challenged colonial law's relegation of religion to the private realm, but also revealed colonial law's deep-seated uneasiness with the cultural ambivalence that had become so characteristic of native-settler social relations. In these instances space was projected as a stable and unchanging category that could be used to stabilise incoherent religious and cultural identities.

³³⁸ *Collector of Madura V. Motoo Ramalinga Sathupathy*, 13 M.I.A 373, p 435 (1868).

³³⁹ Sripati Charan Roy, *Customs and Customary Law in British India* (Calcutta: Calcutta University Press, 1908), p 25.

³⁴⁰ *Abraham V. Abraham*, 9 Moore Indian Appeals 199, 19 ER 716, p 719-20 (1863).

C. 'Territoriality' and the Ethicalness of European Rule

Throughout the period of the British *Raj* we can find evidence of territory, and its allocation and distribution as *property*, being used to demonstrate the ethicalness of British rule. From the early eighteenth century the British were preoccupied with distinguishing lawful ownership of land. This was partly to hold the rightful proprietor responsible for paying land revenues to the Crown. However, determinations of land ownership were also cultural processes. For example, Warren Hastings, the first Governor General of Bengal, aimed to recognise ownership through the implementation of an Anglo-Indian system of land administration. What is particularly noteworthy about this undertaking is that Hastings aimed to do so by encouraging young servants of the Crown to learn aspects of 'native' culture, including Persian, Urdu, and Sanskrit languages. Hastings' envisioned this joint system as one in which the English *revitalised* native traditions. As Cohn explains,

as part of a scholarly and pragmatic project aimed at creating a body of knowledge that could be utilized in the effective control of Indian society...[Hastings] was trying to help the British define what was 'Indian' and to create a system of rule that would be congruent with what were thought to be Indigenous institutions. Yet this system of rule was to be run by Englishmen and had to take into account British ideas of justice and the proper discipline, forms of deference, and the demeanour that should mark the relations between rulers and ruled.³⁴¹

Native identity, was once again, understood as 'disembodied', ahistorical, and separable from the corporeal experiences of everyday life. Just rule was rule through the embodiment of native culture with the aim of revitalising it, *modernising* it.³⁴² Hastings' system of administration, therefore, determined land ownership by virtue of connecting native and European culture. European cultural and legal principles came to mediate the relationship between native communities and their land, and their rightful ownership depended on the extent that native forms of administration could be made 'intelligible' through the intrusion of European legal principles.

Property relations were integral to the exercise of British rule in India, and helped to categorise the connected yet distinct patterns of interaction that characterised colonial rule.³⁴³ While being the bedrock of the Common law system, property did not hold a similar standing in Hindu

³⁴¹ Bernard S. Cohn, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989), p 136.

³⁴² See Cohn's quoting of Davies, p 136. "Hastings 'had to modify and adapt the *old* to fit English ideas and standards. He had to produce a piece of machinery that English officials could operate and English opinion tolerate...to graft Western notions and methods on the main stem of Eastern Institutions."

³⁴³ Bernard S. Cohn, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989), p 136.

law. As Panda-Bhattacharya notes, this “extensive emphasis on ‘property’ was derived not from any study of local situations, but from a social ideology of English origin.”³⁴⁴ Property’s relevance to Hindu law was entirely different as “Hindus had protected their right to property because they had tenaciously held on to their religion,” and not the other way around.³⁴⁵ This reliance on property as a vehicle for legitimising British rule points to the continued prominence that owned conceptions of space enjoyed within colonial social thought, and defines space as an important component of European and native identities. The British sense of self was forged through relationships affecting access to and regulation of geographic area. The apportioning of territory was an integral aspect of British rule, and it was an aspect of British identity that was frequently cultivated against Hindu laws of property & inheritance. These distinct cultural identities were being mined through the division of space, spaces that were sometimes understood as simultaneously persisting, and other times imagined as being located at different points along a linear history. The legal geographies that emerge through colonial law’s definition, division, and allocation of space suggest that different cultural traditions require different spatial locations to operate. This, as the following section on postcolonial law and its relationship to space demonstrates, has become a central defining feature of how contemporary societies manage issues of pluralism today.

4. Reproducing Territory through Postcolonial Governance in Australia & Canada

While it has been argued that colonialism represents a ‘rupture’ and new beginning in history,³⁴⁶ brought about by the previously unanticipated potential of overseas travel and the profound realisation of immense global plurality (cultural, religious, economic, and political), postcolonialism has been described as a period in history defined by “a politics of opposition and struggle, that problematises the relationship between centre and periphery,”³⁴⁷ and defies linear categorisations of time. The disintegration of global Empires and the coalescence of autonomous, sovereign, nation-States, appears to support this characterisation of the ‘post’-colonial as an epoch scarred by dissonance, where previously stable and authoritative epistemologies were made susceptible to critique and discrediting.³⁴⁸ Postcolonialism appears

³⁴⁴ Nandini Panda-Bhattacharya, *Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial Bengal, 1698-1772* (Oxford: Oxford University Press, 2007), p 38.

³⁴⁵ Ibid., p 49.

³⁴⁶ In the sense of travel technologies but also, equally important, as new forms of (property-based) social relations. See, Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India* (USA: Harvard University Press, 1997), p 2.

³⁴⁷ Vijay Mishra and Bob Hodge, "What Is Post(-)Colonialism?," *Textual Practice* 5, no. 3 (1991): P 399.

³⁴⁸ Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1994).

as a global 'awakening' to the injustices of colonial politics, and an appreciation for the pluralism that necessitates the protection of ancient cultures from Western encroachment.

On the other hand, there are also writers who argue that the 'post' in postcolonial is simply a "prefix which governs the subsequent element,"³⁴⁹ and that, despite all our earlier optimism and enthusiasm, "[p]ost-colonialism came to signify something rather remote from self-determination and autonomy."³⁵⁰ Conversely, others are convinced that the disappointment of postcolonial ideology could partially be attributed to the fact that, "[b]y deploying categories such as hybridity, mimicry, ambivalence...all of which laced colonised into colonising cultures – postcolonialism effectively became a reconciliatory rather than a critical, anti-colonialist category."³⁵¹ This view has been criticised by literature that argues the division of the world's societies into simplistic dichotomies like 'colonising' and 'colonised', fails to speak truth to the complexity of human nature and agency, and tends to reduce colonised societies into passive victims.³⁵²

But the aim of this chapter is not to debate the worthiness of postcolonialism as an appropriate theory of analysis or critique. Instead, in writing this section I point to the sensibilities that underpin the postcolonial condition, and the dialectical and often conflicting conceptions of justice and empowerment that underwrite the politics of postcolonial reconciliation. I do this to disrupt common assumptions about postcolonial State-Indigenous relations, structured by the belief that culture and cultural difference are natural and pre-political realities. In the course of this discussion, I examine the function of territory to the recognition of cultural pluralism, and its importance to contemporary quests for Indigenous rights. I suggest that the processes of Occidental Legality continue to operate in the present postcolonial condition, despite contemporary societies' awareness and commemoration of multiplicity and its commitment to constitutional values such as equality and multiculturalism. While these principles suggest an acceptance and affirmation of the value cultural pluralism, the modern methods by which diversity continues to be managed convey a continued discomfort with the possibility of cultural miscegenation and hybridity. The strategies that States employ to manage cultural pluralism

³⁴⁹ Vijay Mishra and Bob Hodge, "What Is Post(-)Colonialism?," *Textual Practice* 5, no. 3 (1991): P 399.

³⁵⁰ Simon During, "Postcolonialism and Globalisation: A Dialectical Relation after All?," *Postcolonial Studies* 1, no. 1 (1998): p 31.

³⁵¹ Ibid. I am assuming that During is referring to Bhabha's work on hybridity and the colonial experience in *The Location of Culture*. Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994). We can find a similar trajectory in Gregory's work where he argues that postcolonial theory may be helpful in making sense of the *colonial present*. He states, "postcolonial critique must not only encounter *amnesiac* histories of colonialism, but also stage a 'return of the repressed' to resist the seductions of *nostalgic* histories of colonialism [emphasis in original]." See, D. Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Malden, MA: Blackwell, 2004), p 9.

³⁵² Gayatri Spivak, "Can the Subaltern Speak?," in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (London: MacMillan, 1988).

appear to produce spatial distance between the dominant group and their perceived Others, even when both groups occupy the same political space of the State.

A. Why Canada and Australia?

Canada and Australia have been selected as jurisdictions for analysis because they share a common colonial heritage as British settler-colonies. Aboriginal policy in each jurisdiction is derived from a common legal basis in British common law, and each incorporates a minority Aboriginal population whose interests do not appear to fundamentally threaten State power. Additionally, there appears to be widespread consensus that both States demonstrate a degree of success in terms of how Indigenous rights-claims and protections are being managed. However, I disturb this assumption. My analysis of these two jurisdictions focuses on how the processes of Occidental Legality continue to shape the political and legal structures of governance in both countries. The structures and systems of governance that are examined in this section include, but are not limited to: legal instruments and statutes (e.g. State Constitutions, the *Indian Act*), legal judgments related to Aboriginal rights-claims, and political schemes developed as a way of redressing the politico-economic depression of Aboriginal societies (e.g. the Reservation system).

While the modern nation-State has been predominately imagined as incorporating an ethno-culturally homogenous population (the 'nation'),³⁵³ its constitution has been, and continues to be, challenged by various members of its population. These challenges represent a rupture in the constructed unity of its political community. Modern politics centres on the power struggles of different social groups within the shared social and political space of the State. Apart from contesting the political authority, legitimacy, and sovereignty of the State, jurisdictional disputes between minority/majority communities also represent objections to the dominant conceptions of legal normativity. As ways of articulating a right to define and introduce different forms of social ordering and regulation, jurisdictional conflicts have the potential to trigger more inclusive conceptions of 'the legal'. Moreover, we can understand these conflicts as comprising both rights-claims under the Common law of the State (involving questions of accommodation), and challenges which dispute the absolute supremacy of State-law (related to questions of autonomy and self-government).

By way of contrast to the common perception that both Australia and Canada have been largely successful in balancing cultural pluralism with national unity, the processes of Occidental Legality continue to create distance between diverse members of Australia and Canada's

³⁵³ Benedict Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*, Rev. ed. (London: Verso, 2006).

political community. In particular I analyse the relationship between each State and their Aboriginal communities. This discussion, therefore, puts into doubt a number of common assumptions about State and minority relations in contemporary democracies such as Canada and Australia. This approach challenges what is often presented as a 'progressive' view of modern legal institutions and informing theories of minority protection. In turn, this challenge forces us to grapple with vital questions about the exercise of power, conceptions of political community, and how space and geography continue to underwrite contemporary experiences of political and cultural domination.

The effects of Occidental Legality identified during the early years of the colonial expansion (namely the emptying of geographic space, the linking of cultural difference and identity to geography, and the temporalisation of geographies of difference) continue to persist within the ideological and institutional structures of both countries. As such, the politics of State-Indigenous relations continue to display evidence of a conceptual emptying of postcolonial geographies, and a bounded, possessed, and culturally-divisible view of space. This view of space now appears to be a taken-for-granted aspect of social and political life. Thus, while postcolonial sensibilities have the benefit of hindsight in terms of an awareness of the highly violent and extremely oppressive conditions perpetuated by the colonial encounter, State-promoted policies for redress have yet to translate into any meaningful reconsideration of the epistemological traditions that perpetuated, reproduced, and sustained these conditions. As a result of this failure to question the relationship between spatial discourse and colonial ideology and institutions, contemporary State responses to Indigenous claims for accommodation and autonomy continue to pivot on the notion that law and geography are culturally-divisible.

I bring these problematic realities into sharper relief by devoting the last part of this chapter to a discussion of how the dominant conception of territory impedes Aboriginal conceptions of land and geography. While reaffirming the significance of land and territory to Aboriginal quests for self-government and greater political and legal autonomy, many Aboriginal scholars discuss how their conceptions of space and geography – particularly their understanding of how these contribute to Aboriginal identity and the structuring Aboriginal government – are entirely displaced by the dominant, colonial model of territory that tends to, more often than not, shape Aboriginal-State relations in ways that are unacceptable to Aboriginal communities. While I may often refer to this as 'Aboriginal perspectives' on territory and governance, I want to make clear that 'Aboriginality' does not signify a monolithic cultural category. Aboriginal communities are extremely differentiated. Census results in Canada have identified at least six hundred different Aboriginal bands and governments, each with their own unique linguistic, artistic, musical, and

customary practices. My intent is to draw attention to issues of structural injustice broadly, rather than to deny complexity or to diminish the plurality and richness of Aboriginal culture and government.

What is important about these perspectives is that they relay a general uneasiness, if not outright rejection, of the terms set by the dominant legal discourse as it pertains to Aboriginal rights, and their relationship with Aboriginal title in land. Authors like Borrows argue that the dominant legal system fails to appreciate the interconnections between land, ecology, environment and Aboriginal identity. For this reason, current State policies aimed at the protection and preservation of Aboriginal rights mistakenly differentiate between their rights *in* land and their rights *on* land. Consequently, many Aboriginal peoples feel that the ongoing legal and political processes do not meet the needs of Aboriginal communities and frequently work against them. One of the ways in which this occurs (and I discuss this in much greater depth in the sections that follow), is by focusing legal attention on the issue of property rights and relations rather than the topic of Aboriginal sovereignty. While the prosperity of Aboriginal communities partially relies on having exclusive access to and use of their ancestral lands, a necessary precondition of this, is that they be able to use their land in accordance with their own normative frameworks. This, I submit, requires that the State not only apportion land, but also recognise Aboriginal peoples' status as self-governing nations.

B. Constructing the Modern State: Embracing Plurality and Rejecting Difference

Mar and Edmonds argue that the Imperial-Indigenous encounters of the last five hundred years have “produced a profound and extensive rearrangement of physical space and peoples.”³⁵⁴ These processes of making and remaking space and the “intricacies of interaction – violent, ideological, and cultural – between colonising and colonised peoples,”³⁵⁵ gave rise to new social geographies in which perceptions of racial and ethnic difference had to be resolved and fractured identities had to be reshaped into a unified political identity of the national community. A collapse of the hierarchical (ecclesiastical and aristocratic) forms of authority led to the emergence of a new democratic liberal ideology that transformed practices of governance in much of the postcolonial world. As the State began to emerge as a new ‘super-entity’ – the union of the political will of a spatially-bounded community – internal coherence and stability became crucial for sustaining the State’s political authority.

³⁵⁴ Tracy Banivanua Mar and Penelope Edmonds, eds., *Making Settler Colonial Space: Perspectives on Race, Place, and Identity* (New York: Palgrave Macmillan, 2010), p. 1.

³⁵⁵ *Ibid.*

Processes of decolonisation typically involved the retention of colonial boundaries under the doctrine of *uti posseditis*, meaning that the purported ‘one nation one State’ headline of the withdrawing powers had greater metaphorical than axiomatic value. The transition to Statehood brought with it a further compression of space as new States rearticulated (material and immaterial) social and political boundaries, which often meant that inhabitants of the new ‘State-space’ were organised so as to have closer interactions with other inhabitants, and sometimes hindered or discouraged from engaging in interactions with those residing outside of the State’s borders.³⁵⁶ Perceptions of ‘proximity’ and ‘distance’ were artificially regulated through the implementation of State-borders, and their associated limitations on access and rules of exclusion. Political and legal jurisdiction became coterminous with the territorial borders of the State. Frequently this had the effect of bringing into sharper, sometimes violent, focus the fact that material divisions of space were far more easily established than the remapping of places and peoples.³⁵⁷

The common identity of ‘the nation’ – as the preeminent political community of the postcolonial world order – had to be reconciled with histories of brutality marked by difference-making, social and political exclusion, and spatial division and displacement, often perpetrated by the very communities to which the victims were now pledging allegiance. Similarly, the postcolonial condition gave rise to a situation in which the existence of ‘savage peoples’ on the same land as the emerging forms of political authority raised significant challenges to how these groups were understood and treated, and in turn, how they conceived their own position and relationship to the new political community of the nation-State.

At the same time, academic study of the postcolonial condition was also marked by a similar shift in thinking, away from colonial oppression and towards the political possibilities of democratic sovereignty and the options that liberal ideology and practice now made available to Indigenous groups.³⁵⁸ Of particular relevance to this emerging focus in scholarship was how

³⁵⁶ Through, for example, the conditioning of strong bonds of nationality and national identity. See, Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Rev. ed. (London: Verso, 2006). Malcolm Anderson refers to this as the ‘psychological’ and ‘sociological’ significance of frontiers, and argues that often transgressive performances of border-behaviour have the effect of producing anxieties and hostilities. See, Malcolm Anderson, *Frontiers: Territory and State Formation in the Modern World* (Cambridge, UK: Polity Press, 2004), p 2-3.

³⁵⁷ E.J. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge: Cambridge University Press, 1990), p 80-100.

³⁵⁸ The postcolonial writings of Fanon and Césaire can be considered influential not only because of their unique status as subaltern voices of native oppression, but because they provide alternative conceptions and designs of how the world could be made better. See, Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963). Also see, F. Fanon, *Black Skin, White Masks* (Pluto Press, 1986). Also see, Aimé Césaire, *Discourse on Colonialism*, trans. Joan Pinkham (New York: Monthly Review Press, 1972).

postcolonial settler societies³⁵⁹ (in which Indigenous populations were largely displaced and decimated) would handle the colony-to-State transition as they faced the difficult task of reconciling the State's history of complicity in past exercises of colonial violence.³⁶⁰ For some States, the desire to maintain territorial integrity had, at times, superseded demands for the kind of political stability that would recognise and record historical injustices. In other instances, powerful non-State actors and interests have prompted States to acknowledge conditions of cultural pluralism and to pursue structures of governance by devolving power and patterns of territorial autonomy. Canada and Australia demonstrate both of these tendencies of postcolonial politics.

i. *Constitutional Developments and (dis)Locating the Political Community*

As settler-colonies, Australian and Canadian Governments have become aware that the State shares a large part of the burden of responsibility for colonial injustice and the systematic oppression and genocide suffered by their Aboriginal populations. Both Governments have acknowledged the past experiences of violence and injustice suffered by the native communities of settler-colonies and, in some instances, have reintegrated under the rubric of reconciliation.³⁶¹ This was partially inspired by the realisation that these incidents were not isolated to the far-removed 'past'. The adoption of racialised discourses of difference and the use of discriminatory social policies were continued by both State Governments during the process of decolonisation.³⁶² The authenticity of reconciliation was partially reinforced by the

³⁵⁹ Barker describes settler colonialism as "a distinct method of colonising involving the creation and consumption of a whole array of spaces by settler collectives that claim and transform places through the exercise of their sovereign capacity." Adam J. Baker, "Locating Settler Colonialism," *Journal of Colonialism and Colonial History* 13, no. 3 (2012).

³⁶⁰ Glen S Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada," *Contemporary Political Theory* 6, no. 4 (2007). Some argue that, States like Canada still remain complicit by their failure to acknowledge their colonial past. See, Jennifer Henderson and Pauline Wakeham, "Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada," *ESC: English Studies in Canada* 35, no. 1 (2009).

³⁶¹ Brenna Bhandar, "Anxious Reconciliation(S): Unsettling Foundations and Spatialising History," *Environment and Planning D: Society & Space* 22, no. 6 (2004). Though Bhandar complicates this process within the Canadian context, questioning whether the development of one official history can ever hope to appropriate represent native experiences of oppression and subjugation.

³⁶² See, for example, Australia's policy of cultural assimilation which, from 1910-1970, resulted in the forcible removal of Aboriginal children from their homes. This is best captured in the numerous 'Stolen Generation' debates. See, "The History of the Stolen Generation," National Sorry Day Committee, <http://www.nsdcc.org.au/stolen-generations/history-of-the-stolen-generations/the-history-of-the-stolen-generations>. <Accessed 1 Oct. 2013> Whether this is a policy that has been entirely abandoned is questioned by Armitage. Armitage also speaks of the discriminatory labour policies espoused by the Australian State against its Aboriginal population, whereby early Aboriginal labourers worked for rations and accommodation rather than wages. See, Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995), p 7, 17.

courts invalidating the sovereignty-doctrine of *terra nullius*,³⁶³ and recognising Aboriginal prior occupation.³⁶⁴

For a large part of Australia's history Aboriginal issues have failed to garner official governmental attention. It was only recently that Australia shifted away from conceptualising Australian-Aboriginal relations as a matter of local concern, which allocated responsibility over Aboriginal-Australian relations to each of its constituent states. In 1967 the State acquired concurrent powers to legislate for Aboriginals,³⁶⁵ thus placing Aboriginal relations on the Federal agenda. Conversely, Canada was quick to distinguish 'Indian Affairs'³⁶⁶ as a concern solely of the Federal Government,³⁶⁷ allocating responsibility over Aboriginal issues to the State rather than the constitutive provincial legislatures. The Canadian Parliament established the *Indian Act* in 1876 under the provisions of the *Constitution Act* of 1867. Interestingly, the Act declares its preoccupation with territorial space right from the outset when it accords the State exclusive authority to legislate over all issues related to "Indians and Lands Reserved for Indians." The rights granted to Aboriginals under the Indian Act were later, in 1982, entrenched within the Canadian Constitution.

Both the Canadian and Australian State have made important strides in promoting a more inclusive conception of the nation. In order to recognise the unique status of its Aboriginal constituents Canada has constitutionally entrenched First Nations' rights as part of its acknowledgement of past injustices and in recognition that the First Nations form an integral component of Canadian history. Similarly, the Australian Government has accepted its part in perpetrating Aboriginal social-genocide and has gone some way towards compensating Aboriginals for the deprivation of their important social and economic entitlements.³⁶⁸ These processes have, at times, qualified the political authority of the State by the recognition of the messy and disordered history of its territory. For all intents and purposes, both Canada and Australia appear to have embarked on important projects aimed at greater Aboriginal

³⁶³ The initial denial by Australia of Aboriginal pre-contact title over colonised lands was overturned in 1992 by the landmark *Mabo* decision. *Eddie Mabo V. The State of Queensland (No.2)* 175 CLR HCA 23 1(1992).

³⁶⁴ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), p 4-5.

³⁶⁵ Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995), p 14.

³⁶⁶ 'Indian' in this respect is a highly controversial term given its past derogatory usage. As such, I use the word in quotes, and only to discuss aspects of politico-legal history that requires precision in terminology. In Canada the term has been replaced by 'First Nations'.

³⁶⁷ *Constitution Act (1867)*, s.91(24).

³⁶⁸ For an example of how Aboriginals were dispossessed under the political system of Australia see, Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995), p 16-7.

empowerment by, in turn, qualifying (in theory) the State's own claims of unfettered territorial sovereignty.

Nonetheless, the successes of Aboriginal recognition and accommodation have not been entirely without impediment. Indigenous Australians continue to remain unrecognised by the State's Constitution even today,³⁶⁹ and the Australian government's initial refusal to issue an official apology for the genocide Aborigines suffered under previous governments has been a bone of contention for at least the last decade.³⁷⁰ Similarly, empirical studies of Aboriginal rights have been highly critical of the social and political inequalities plaguing Canada's Aboriginal communities.³⁷¹ Many such advocates have argued that a legal recognition of First Nations' rights *must* be followed up by robust institutional mechanisms that deal with the unequal economic and political status of Aboriginal Canadians and the unique experiences of deprivation that this gives rise to.³⁷²

Both Canada and Australia have also gone a long ways to defining Aboriginal identity.³⁷³ The Canadian *Indian Act* of 1876 defines 'Indian' legal status as emanating from an Indian father.³⁷⁴ As the sovereign union of multiple competing interest and identities, the State has taken it upon itself to develop and impose its own conception of 'Aboriginality' onto its Indigenous population. This external shaping of identity has been challenged by members of the Aboriginal

³⁶⁹ Edward Johnson, "Abbott Seeks to Recognize Aborigines in Australia's Constitution," *Bloomberg News*(2013), <<http://www.bloomberg.com/news/2013-12-31/abbott-seeks-to-recognize-aborigines-in-australia-s-constitution.html>> (Accessed: 1 January 2014).

³⁷⁰ When Aboriginal children that had been forcibly removed from their parents during the early to late twentieth century (the 'lost generation') filed a federal class action suit against the government, a Royal Commission investigated their allegations and found that the State had engaged in 'social genocide'. However, the Howard Government of 2000 continued to refuse an apology to the Aboriginal community, which sparked an international outcry in light of Australia hosting the 2000 Sydney Olympics. An apology was, however, later issued by the Rudd Government in 2008. See, Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Meaning of Australian Multiculturalism* (Durham, NC: Duke University Press, 2002), p 37-8. Also see, Ben Kiernan, "Cover-up and Denial of Genocide: Australia, the USA, East Timor, and the Aborigines," *Critical Asian Studies* 34, no. 2 (2002): p 164-5. Also see, "Australia, House of Representatives, Parliamentary Debates," in *Hansard* (13 February 2008), p 167-73, (the Hon K M Rudd MP, Prime Minister). Also see the Stolen Generation Case, *Kruger V. Commonwealth*, 1 CLR 190(1997).

³⁷¹ Limited access to appropriate healthcare and fair access to education (and forms of education using cognitive styles that were consistent with Aboriginal worldviews) are two of the most prominent criticisms of the status of Aboriginals social rights. See, Marie Ann Battiste and Jean Barman, "First Nations Education in Canada: The Circle Unfolds." (Vancouver: UBC Press, 1995). Also see, Sannie Y Tang and Annette J Browne, "'Race'matters: Racialization and Egalitarian Discourses Involving Aboriginal People in the Canadian Health Care Context," *Ethnicity and Health* 13, no. 2 (2008).

³⁷² Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), p 26-8.

³⁷³ *New South Wales Aborigines Protection Act (1909)*.

³⁷⁴ The restrictions on Aboriginal identity imposed by the *Indian Act* has caused some to remark that the Act has not only political significance, but also discursive and epistemological value, particularly because it serves as an "overarching discourse of classification, regulation, and control...[that]produces ways of thinking – a grammar – that embeds itself in every attempt to change." Accordingly, its discursive value stems not only from its capacity to enshrine outside conceptions of Aboriginality, but also from its ability to shape how Aboriginal communities themselves understand and express their own identity and what sorts of political, cultural, and economic rights they envisage as being within the realm of possibility. See, Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview," *Hypatia* 18, no. 2 (2003): p 3-4.

community, some of whom have questioned the State's self-proclaimed capacity to manage their most personal and private relationships, and have argued that this capacity has translated into intersectional racial and gender discrimination.³⁷⁵ Similarly, a series of early twentieth century statutes promulgated for the protection of Australian Aborigines had the effect of regulating the most intimate parts of their lives, including where they could and could not live, where their children could live, and where they could work.³⁷⁶ From this we can see that space, in particular, rights over it and access to it, has also been a major roadblock to improving State-Indigenous relations. State-recognition of Aboriginal rights to land is typically of a limited nature, given that an acknowledgment of the illegitimacy of Crown title has not led to its immediate extinguishment, but has instead created a nested form of ownership in which Aboriginal possession becomes subordinate to European possession.

The fact that Aboriginal peoples were often given exclusive access to space that was the least economically viable, encompassed inhospitable and challenging topography, and was usually far removed from urban centres, points to a deliberate State-policy of racial segregation.³⁷⁷ This was often underwritten by political and legal discourse and practice that prohibited cross-cultural intermixing,³⁷⁸ and social conventions which reproduced Aboriginal displacement through the racialisation of public spaces like the classroom and hospital.³⁷⁹ As Byrne asserts, "[r]acial segregation, by its very nature, is a spatial practice. It is about the separation of people in space and the rules and devices that are set up to achieve this. A segregated society necessitates segregated landscapes..."³⁸⁰ These landscapes were cultural spaces produced through the law, which had disparate impact on the Aboriginal peoples in both countries.

Spatial techniques inform every aspect of managing the 'Aboriginal problem', and they do so in ways that further displace and isolate Aboriginal communities. The racialisation of space has

³⁷⁵ *Lovelace v. Ontario*, 1 S.C.R. 950 (2000).

³⁷⁶ *Northern Territory Aborigines Act (1910)*. Also see, *New South Wales Aborigines Protection Act (1909)*. Also see, *Aboriginals Protection and Restriction of the Sale of Opium Act (1901)*.

³⁷⁷ Jean Barman, "Race, Greed and Something More: The Erasure of Urban Indigenous Space in Early Twentieth-Century British Columbia," in *Making Settler Colonial Space: Perspectives on Race, Place, and Identity*, ed. Tracey Banivanua Mar and Penelope Edmonds (New York: Palgrave Macmillan, 2010), p 155-6. Also see, Evelyn Peters, "Geographies of Aboriginal People in Canada," *The Canadian Geographer/Le Géographe canadien* 45, no. 1 (2001).

³⁷⁸ Patricia Grimshaw, "Interracial Marriages and Colonial Regimes in Victoria and Aotearoa/New Zealand," *Frontiers: A Journal of Women Studies* 23, no. 3 (2003). Also see, for example, Benton's note on Forster's *A Passage to India*, and how the politics of racial and cultural contamination played into trial proceedings against an Indian man alleged to have molested a White woman. While the passage is from a fictional novel, it provides insight into the prevailing 'colonial mentality' of the time. See, L.A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (London: Cambridge University Press, 2002), p 129-30. Pascoe considers this in the context of colonial America and refers to these forms of legal regulation as 'miscegenation law'. See, Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America," *The Journal of American History* 83, no. 1 (1996).

³⁷⁹ Denis Byrne, "Nervous Landscapes: Race and Space in Australia," in *Making Settler Colonial Space: Perspectives on Race, Place, and Identity*, ed. Tracey Banivanua Mar and Penelope Edmonds (New York: Palgrave Macmillan, 2010).

³⁸⁰ *Ibid.*, p 103.

been a particularly insidious legacy of the colonial encounter and one that produces anxiety as space between “black and white bodies” reduces to ‘zero’ and “black and white bodies actually touch.”³⁸¹ One of the ways in which modern political authorities have sought to reduce this anxiety is by engaging in processes which give the illusion of distance between closely located social groups. It is partially in assuaging these anxieties that territorial strategies for resolving issues of diversity have been pursued.

In the following sections I specifically examine conflicts related to Aboriginal title, the Aboriginal Reserve System, and discourses of biodiversity, to study what effect Occidental Legality has had on the protection and promotion of Aboriginal cultural diversity. I argue that it is through methods of managing diversity grounded in Occidental Legality, that the Australian and Canadian State reproduce a bounded, owned, culturally-divisible and temporally-located model of space. In so doing, the politico-legal structures that have been deployed to ‘deal with’ native cultural difference have the effect of fixing Aboriginal identity and presenting it as something intrinsically different, and often antithetical, to the dominant identity of the nation.

C. Situating Native Identity through Claims for Aboriginal Rights and Title

In recognising that native dispossession was a large part of the European conquest of both Australia and the New World, both Australia and Canada have sought to rectify these past injustices by reinstating Aboriginal title over certain areas of Crown territory. In spite of recognising the illegitimacy of colonial claims of possession on the basis of the doctrine of *terra nullius* (land belonging to no one), Aboriginal title is *not* a proprietary right. This means that a granting of title does not automatically extinguish the Crown’s ownership of Aboriginal land.³⁸² By granting Aboriginal title, Governments allow title-holders to exclusive use and occupation of the land in question for the exercise of practices, customs, and traditions that are “integral to the distinctive culture of the Aboriginal group,” and which can be shown to have existed before European-Aboriginal contact.³⁸³

Judicial decisions related to claims for Aboriginal title reproduce the model of space that emerged within the earlier explored techniques of Imperial cartography and ethnography. Australian and Canadian jurisprudence reinforces a bordered, culturally-divisible, and temporally located design of space that is heavily underwritten by claims of possession and ownership. I will discuss this claim further throughout the next three sections of the chapter. In

³⁸¹ Byrne, "Nervous Landscapes: Race and Space in Australia," p 104

³⁸² *Eddie Mabo V. The State of Queensland (No.2)* 175 CLR HCA 23 1(1992). Also see, *Wik Peoples V. State of Queensland*, FCA 1443(2000). Also see, Opinion of Justice McEachern in *Delgamuukw V. British Columbia*, 3 S.C.R 1010, p 25 (1997). =

³⁸³ Justice Lamer in *R. V. Van Der Peet*, 4 C.N.L.R 177, p 201 (1996).(S.C.C)

deciding Aboriginal claims through this vision of space, the courts not only force Aboriginal communities to rely on a form of social and political ordering developed by the dominant society,³⁸⁴ but also compel them to articulate those demands using an externally-developed conception of Aboriginal identity which often conflates European experiences of Aboriginal people with European knowledge *about* Aboriginal people.³⁸⁵ In some ways this mirrors the earlier discussion in Chapter Two, related to Columbus' letter and his perception that European voyagers were being 'invited' to colonise visited places. Compelling the communities that are being marginalised to reframe their subjectivity using the language and institutions of the dominant legal discourse could very well be misinterpreted as a 'consensual' and voluntary reconstruction of Aboriginality; an *invitation* to possess and define.

Within the Canadian context, Aboriginal title to Crown lands was sanctioned under the amended *Constitution Act* of 1985. While the provisions allowed Aboriginals exclusive use and occupation of designated parts of Crown territory, it did not accord them the right to possess territory as 'private' property, or to distribute or extract resources from it for private gain. This meant that possession could only be surrendered to either the Band or the Crown, and not private individuals. While European ownership was projected through the occupation and settling of land, Indian possession was substantiated through law, with the approval of the Minister of Indian affairs. Ownership did not emerge from a *performance of space*, nor was it understood as an *inherent* right, like in the European context. Instead, Aboriginal title emanated from a right of access granted by a colonial government and evidenced through a 'certificate of possession.'³⁸⁶ In other provisions of the Act, Indian possession becomes dependent on claimants fulfilling "conditions [of]...use and settlement" prescribed by the Minister. This then produced the possibility of a right to only 'temporary' possession and occupation.³⁸⁷ Through these processes of granting title, a colonial construction of possession continues to persist, making Aboriginal title dependent on claimants being able to satisfy a European vision of what counts as appropriate 'settlement' and 'use' of land. These restrictions suggest an entirely different understanding of possession for Indians in comparison to Europeans, whose rights of possession were seen as permanent, inviolable, and self-perpetuating (through the legal

³⁸⁴ See the Court's reference to David McKay's statement to the 1888 Royal Commission to the Nass Valley in British Columbia. See, *Calder V. Attorney General of B.C.*, S.C.R 313, p 319 (1973).

³⁸⁵ *Delgamuukw V. British Columbia*, 3 S.C.R 1010(1997). In *Delgamuukw* Supreme Court of Canada determined that traditional oral histories may be submitted as 'proof' of an historical occupation of the land, along with being considered "normative statements respecting Aboriginal law and systems of governance." However, in verifying the existence and substance of these oral histories, the courts relied primarily on ethnographic and anthropological studies, conducted by researchers educated within a Eurocentric tradition.

³⁸⁶ *Indian Act (R.S.C., 1985, C. I-5)*, s. 20.

³⁸⁷ While 'permanent improvements' to reserve lands may evidence 'lawful possession,' but what counts as 'permanent improvements' is at the discretion of the Minister. See, *Ibid.*, s.22-3.

doctrine of sovereignty). If the control and regulation of space is a measure of autonomy and power, then we can see these particular stipulations as perpetuating conditions in which Indian empowerment is limited to the extent to which they can adopt and employ a European spatial perspective.

In many cases of Aboriginal rights that are decided through the courts it becomes clear that Aboriginal rights to cultural practice are intrinsically linked to space, in ways that the cultural practices of other communities are not. For example, the court's ruling *Adams* suggests that Aboriginal cultural practice is a public rather than private right. The appellant in *Adams*, makes a successful appeal to the Supreme Court for a charge of unlicensed fishing on traditional lands (to which his band has no title). He appeals to the Supreme Court on the grounds that, under s.35 of the Canadian Constitution, his Aboriginal rights are protected, including the right to engage in traditional practice integral to his distinctive culture. The primary question up for debate is whether Aboriginal rights are inherently based in claims to land, or whether the right to title represents one aspect of a broader conception of Aboriginal rights. Deciding in favour of the appellant, the majority opinion states that Aborigines can make claims for rights to engage in traditional practices even on lands to which successful claims of title may not be possible. However, the courts further suggest that this right is not an *abstract right*, but a site-specific one, and could only apply to the tract of land in question.³⁸⁸ Hence, the exercise of cultural autonomy *requires* Aborigines to first seek permission by demonstrating a connection to the land in which these practices are to take place. This suggests that while culture is often relegated to the private sphere for most Canadians (and thus subject to less encroachment by the official law), Aboriginal cultural practice becomes part of the public domain. In linking Aboriginal cultural practice to geographic space the courts are able to conceal how the law more stringently regulates the exercise of Aboriginal cultural identity in comparison to mainstream Canadians.

The problem in managing questions of cultural diversity through the invocation of a particular conception and connection with space is that it has the tendency to link native identity to geographic space rather than the human subject. In making successful claims for title, Aboriginal communities have to take on aspects of an identity defined by the dominant society and frequently have to *confirm* their otherness by pointing to a distinct *racial* identity.³⁸⁹ The courts have specifically set out a test for determining Aboriginal identity that is specifically 'backward-looking' and compels Aboriginal groups to demonstrate their cultural identity by

³⁸⁸ *R V. Adams*, 13 C.N.L.R, para. 30 (1996).(S.C.C). See the opinion of Justice Lamer in para.30.

³⁸⁹ *Eddie Mabo V. The State of Queensland (No.2)* 175 CLR HCA 23 1(1992).

pointing to the presence of pre-contact practices³⁹⁰ The fixity of time and space, therefore, become crucial ingredients in portraying the collective identity necessary for making contemporary claims for Aboriginal cultural autonomy.

Often the requirement of an Aboriginal identity that is spatially and temporally fixed and culturally (rather than politically) defined, sits at odds with the self-identity of the rights-claiming group. For example, *Delgamuukw* involved a case in which two different tribes in British Columbia were claiming ownership and jurisdiction over large tracts of the province's land. The B.C. Court of Appeal ruled that the native communities could not use their oral histories as evidence of prior occupation of Crown territory, and claimed that a historical analysis of the colonial encounter revealed that Aboriginal title was a "pleasure of the Crown."³⁹¹ The courts assume a definition of Aboriginality that stems from a history that only goes back as far as the colonial encounter. Further, the paternalistic characterisation of the colonial-native relationship carries forward into the Supreme Court's decision, in which the Court adopts a 'citizens-State' paradigm of interaction that is inconsonant with the community's self-definition as a self-governing Nation, and which also understands Aboriginality as stemming from Canadian citizenship with the 'added plus' of special group-differentiated rights being granted by the Government.³⁹² Aboriginal rights, like Aboriginal title, were understood as being at the 'pleasure' of the governing authority. In addition, in rejecting the use of oral histories, the Appeal Court was suggesting that the appellant's conception of their self-identity was 'unintelligible' to the dominant legal discourse.³⁹³ In fact, the courts ruled that the trial court's "failure to appreciate or direct [itself] to, or have proper regard to relevant [Aboriginal oral] evidence" was not sufficient for the Appeals Court to intervene and review the trial court's finding of fact.³⁹⁴ What is further interesting about the Appeal and Trial Courts' rejection of Aboriginal oral histories as evidence of their connection to the land is that they understand these as subjective experiences that cannot be objectively verified. Yet, Chapter Two and Three clearly demonstrate how the notion of territory is also, borne out of subjective *European* experience, and yet the objectivity and neutrality of territory is rarely challenged.

The court in *Delgamuukw* reasoned that since the plaintiffs' claim hinged on pre-contact Aboriginal occupation of now Crown territory, it was necessary to determine whether the

³⁹⁰ As the approach set out by the courts in *Van Der Peet* suggests. *R. V. Van Der Peet*, 2 S.C.R. 507(1996).

³⁹¹ *Delgamuukw V. British Columbia*, 104 DLR 470, para. 211 (1993).

³⁹² Dimitrios Panagos, "The Plurality of Meanings Shouldered by the Term 'Aboriginality': An Analysis of the *Delgamuukw* Case," *Canadian Journal of Political Science* 40, no. 3 (2007).

³⁹³ A view confirmed by the Supreme Court's statement of facts about the case. See, *Delgamuukw V. British Columbia*, 3 S.C.R 1010, para.5 (1997).

³⁹⁴ *Delgamuukw V. British Columbia*, 104 DLR 470, para. 324-7 (1993). The Court of Appeal's ruling to dismiss the use of Aboriginal oral history as evidence of prior-occupation was overturned on appeal by the Supreme Court of Canada.

Aboriginal community of British Columbia could properly be qualified as 'self-governing' prior to the arrival of European settlers. The interlacing of space with government and the overriding belief that governance was something that was exercised *over space*, rather than something borne out of interactions taking place *within space* significantly influenced both the Appeal and Supreme Courts' reasoning. In orientating claims for recognition towards a particular conception of space, it was *space* and not *the community* which became the locus of judgments.³⁹⁵ Culture became reduced to geographic area, and the authenticity of 'Aboriginality' became highly dependent on the ability of the appellants to demonstrate a continuous history of occupation and use of Crown land.

However, even in those moments when the courts recognised the historic presence of Aboriginal peoples on Crown lands, it did not acknowledge their histories as *coeval* histories of spatial occupation and use. Aboriginal title jurisprudence relied on "linear, teleological forms of history...to continually reiterate the myth of a legitimate assertion of sovereignty,"³⁹⁶ which "mirrors an understanding of law as having a stable, knowable, origin from which it derives and continues to progress."³⁹⁷ In 'spacing' Aboriginal title the courts legitimise and enable liberal law's closure by denying the transformative potential of alternative historical trajectories that may undermine the State's claims of sovereignty. This tends to mute competing juridico-historical narratives and prevents "challenges to the ideological and material boundaries of the State."³⁹⁸ Aboriginal title jurisprudence therefore becomes crucial for encoding the State's own claims of sovereignty and jurisdiction. For example, in *Milirrpum v. Nabalco*, Aboriginal claims for proprietary land rights triggered a legal debate centring on whether Australia was settled, conquered or ceded during the process of colonisation.³⁹⁹ In this particular instance, the Australian Supreme Court found that the conventional view that Australia was 'settled' rather than 'conquered', was a "matter of law which could not be overturned by a reconsideration of historical evidence,"⁴⁰⁰ meaning that the doctrine of *terra nullius* – which legitimised State sovereignty - overrode claims for Aboriginal title. What we see through this cluster of cases is

³⁹⁵ See, for example, how the Courts have become fixated on delineating boundaries of occupation in adjudicating Aboriginal rights claims. Rather than focusing on Aboriginal claims of normative difference and how that difference negatively impacts their sense of self and their cultural identity the Courts have shown an intense proclivity for basing their claims of protection on historical orderings of space which appears as somewhat superfluous to the issues that lie at the heart of such claims. See, *Delgamuukw V. British Columbia*, 3 S.C.R 1010, pp 27-8 (1997).

³⁹⁶ Brenna Bhandar, "Anxious Reconciliation(S): Unsettling Foundations and Spatialising History," *Environment and Planning D: Society & Space* 22, no. 6 (2004): p 831.

³⁹⁷ Ibid.

³⁹⁸ Ibid.: p 832.

³⁹⁹ *Milirrpum V. Nabalco*, 17 FLR 141(1971).

⁴⁰⁰ Ruth Kerr, "Aboriginal Land Rights: A Comparative Assessment: Background Information Brief 23,"(1991), <http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/BackgroundInformationBriefs/bib23rk.pdf>.(Date Accessed: 12 November 2013) Also see, *Milirrpum V. Nabalco Pty Ltd.*, 17 FLR 141(1971).

that the courts' reliance on history is consistent, and often liberal law and history are seen as antithetical. In one set of cases history is used to undermine liberal legal doctrines (i.e. sovereignty), while in others cases it is perceived to have no bearing on the legitimacy and validity of liberal law. We are given the impression that liberal law stands outside the paradigm of time, mobilised, and continuously progressing, while questions of 'cultural' or 'native' law must be resolved by referring to history, essentially, going back in time.

While an analysis of the case law reveals that Canadian courts are becoming more open to recognising Aboriginal land claims, and acknowledging that conquest and discovery did not extinguish their pre-existing claims to land,⁴⁰¹ the courts continue to accept the idea that Aboriginals land-rights are, in fact, a *legal right* and *not* an inherent right;⁴⁰² a right accorded by the conquerors based on their particular legal system. This is demonstrated in some instances by the courts determining claims for title by trying to establish colonial boundaries.⁴⁰³ The law's reliance on colonial history suggests that Aboriginal rights emerged from the mapping of linear and stable borders upon disordered and shifting social relations. This reasoning also suggests a paradox, in the sense that colonial borders and boundaries are referred to in determining a purportedly *pre-colonial* claim to land.⁴⁰⁴

What is most clear through this analysis of Aboriginal title jurisprudence is that courts are refraining from acknowledging the racial undertones of property relations. Over the course of the colonial enterprise, property relations, and here I refer specifically to the possession and ownership of geographic space, were deeply racialised. To have control over space was to be human. This point was made quite clearly in my reading of Vitoria's *jus gentium*, where access to space becomes a necessary precondition for the extension of a universal legal regime. From this perspective, the humanity of native communities is determined by the extent to which they extend a 'reciprocal' right of sojourn.⁴⁰⁵ In Chapter Two I specifically reveal how these notions of territory emerged through routine Imperial and colonial practices (i.e. the making of maps and the narrativising of colonial experiences in foreign places), which were, themselves, deeply racialised (e.g. they neutralised places of native occupants by reporting them as 'blank spaces'). The courts, therefore, leave intact these partial relations of power, power vested in the notion of cultural and racial difference, when they interpret native demands for recognition as demands

⁴⁰¹ *Lovibond V. Governor General of Canada*, A.C. 717(1930). Also see, *Eddie Mabo V. The State of Queensland (No.2)* 175 CLR HCA 23 1(1992).

⁴⁰² *Eddie Mabo V. The State of Queensland (No.2)* 175 CLR HCA 23 1(1992).

⁴⁰³ *Calder V. Attorney General of B.C.*, S.C.R 313, p 316 (1973).

⁴⁰⁴ Brenna Bhandar, "Plasticity and Post-Colonial Recognition: 'Owning, Knowing, and Being'," *Law Critique* 22(2011): p 236.

⁴⁰⁵ I say purportedly because it was a right that was known to be beyond the reach of Aboriginal communities given the absence of adequate transportation technologies. See p 118 of this Chapter.

for 'more space' to engage in cultural practices. These demands are not for space, but for 'property'. They are for rights of ownership over space and, by extension, recognition of their humanity and an absolute right to exercise that humanity in ways that have, from the time of the first Imperial-Indigenous encounters, been taken away from them on the basis of race. Accordingly, demands for native recognition are connected to an acknowledgment of the native's *coeval* subjectivity in ways that were entirely effaced through the colonial encounter. This form of *coeval recognition* is a demand that, as I will show in the following sections, is continuously denied by the courts, and spatial discourse figures prominently in the ways that this appeal is rejected and concealed. It is also an appeal that, as I argue in Chapter Five, needs to be addressed if postcolonial States are to move on from the history of colonial domination and exploitation.

D. Immobilising the Native Body

Apart from fixing Aboriginal identities in space, Canada and Australia have managed Aboriginal cultural diversity in ways that continue to racialise space in order to fix and limit the movement of the native body. The postcolonial State is marked by places of 'Aboriginality', where Aboriginal presence is contained, made more visible, and is often imagined as an expression of 'the past'. The Aboriginal Reserve system – as spaces set apart for the exclusive habitation and use by Aboriginal communities⁴⁰⁶ – is one obvious example. The Reservation brings Aboriginality into sharper focus, all the while, presenting the polity with a distinct and very visible geography against which to develop its own identity.⁴⁰⁷

However, racialised spaces need not always be institutionally defined, like the Reserve. In many instances racialising space is a matter of social convention and takes place in a much more localised and informal manner, through interpersonal communications that are not always subject to political and legal scrutiny. Moreover the spacing of race – relegating the racial Other to a separate space – is not always an injurious practice. At times these places of Aboriginality, like the Reserve, inspire feelings of belonging and comfort, giving rise to unique experiences consonant with the Aborigines sense of self.

⁴⁰⁶ In the Canadian context the Reservation is understood as an essential component of Aboriginal cultural protection. Reynolds suggests that in the Australian context Reserves were traditionally implemented as forms of compensation for British dispossession. See, Henry Reynolds, *The Law of the Land* (Melbourne, Australia: Penguin Books, 1987).

⁴⁰⁷ David Delaney, "The Space That Race Makes," *The professional geographer* 54, no. 1 (2002). Delaney explains how the study of the intersection between race and space brings to light important ideas related to the operation of power and the formulation of relational identities.

i. *The Aboriginal Reserve System*

The Reservation has been described by Delaney as one of the “central places...[where] conventional geographies of race lie.”⁴⁰⁸ It is a space in which modern societies anticipate racial difference and cultural diversity. It is a place that contains, limits, and prevents the movement of racial bodies. As Harris notes, “the allocation of reserves...defined two primal spaces, one for Native people and the other for virtually everyone else”.⁴⁰⁹ The Reserve was predicated on a “racialised juxtaposition of civilisation and savagery.”⁴¹⁰ Through these narratives the Reservation is revealed as a form of racial segregation, a divided landscape underwritten by a set of rules and devices that define and distinguish the racialised Other in and through space.

The Reserve system in both Canada and Australia arises from the view that a separate space of Aboriginality is necessary for protecting traditional groups against the hostility of the open environment.⁴¹¹ While the Reservation may have, indeed, been established with the aim of promoting and protecting Aboriginal culture, it is a space that is produced through unequal exercises of power and race-centred ideologies that may have the effect of moralising cultural difference and (perhaps unintentionally) producing racial hierarchies. For example, the Australian and Canadian Reservation has arisen out of a history of racial segregation, in which Aboriginal communities were confined to completely disconnected spaces such as offshore islands.⁴¹² Often Reserve lands were chosen based on their limited agricultural and commercial value and potential, and by their location some distance away from settled townships and cities.⁴¹³ The Reserve emerges from a social desire to set apart the Aboriginal body from the rest

⁴⁰⁸ Delaney, “The Space that Race makes”, p 6.

⁴⁰⁹ R Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2011), p 265, 68.

⁴¹⁰ Ibid.

⁴¹¹ Indeed, we can say that all forms of autonomy and protection arise from a similar view – promulgated by the processes of Occidental Legality - where territory and territoriality play a crucial role in the imagining of “cultures as coherent, bounded, contiguous and persistent...a sense that human sociality is naturally localised and even locality-bound.” And thus, to some extent the treatment of Aboriginal communities is, at least, consistent with our understanding of the relationship between territory and culture. See, Arjun Appadurai, “Sovereignty without Territoriality: Notes for a Postnational Geography,” in *The Anthropology of Space and Place—Locating Culture*, Oxford: Blackwell, ed. Setha M. Low and Denise Lawrence-Zuniga (Malden, MA: Blackwell, 2003), p 344.

⁴¹² Denis Byrne, “Nervous Landscapes: Race and Space in Australia,” in *Making Settler Colonial Space: Perspectives on Race, Place, and Identity*, ed. Tracey Banivanua Mar and Penelope Edmonds (New York: Palgrave Macmillan, 2010), p 170.

⁴¹³ Jean Barman, “Race, Greed and Something More: The Erasure of Urban Indigenous Space in Early Twentieth-Century British Columbia,” in *Making Settler Colonial Space: Perspectives on Race, Place, and Identity*, ed. Tracey Banivanua Mar and Penelope Edmonds (New York: Palgrave Macmillan, 2010), p 155. As Barman explains, in Canada, this took the form of neutralising the settled urban areas of Indian presence by more strongly targeting city-dwelling Aborigines for displacement.

of the polity, and we can find evidence of racialised thinking in the way that Aborigines were treated within localised spaces like hospitals and schools.⁴¹⁴

Because the space in which the body is situated becomes “constitutive of one’s sense of self,”⁴¹⁵ the Reserve can also be described as a spatial performance that reproduces racialised identities. The Reserve has become a marker of Aboriginality, both in terms of how Aboriginals understand themselves, but also in terms of how non-Aboriginals define and understand them. For many Aborigines the Reservation represents a place of belonging, of spiritual, linguistic, and cosmological commonality, that induces feelings of comfort and well-being.⁴¹⁶ This may be partly attributed to the fact that, as I discussed in Chapter Two, lands reserved for Aboriginal communities were sometimes closed in by European-settled areas.⁴¹⁷ So, in some ways, the Reserve provided a sense of safety and familiarity when compared to the open spaces structured by foreign practices and oppressive institutions.

But not all Aborigines see the Reserve as intrinsic to their sense of self.⁴¹⁸ For those that migrate off the Reservation, the Reserve may represent only one of many places that inform their sense of self. These experiences suggest a multidimensionality that is often effaced within the legal discourse that considers Aboriginal identity. Part of this may be attributed to the fact that those that move off the Reserve incorporate a hybrid identity. As I illustrated through the discussion of *Abraham*, the law has traditionally been troubled by imprecise identities, identities that defy pre-existing and clear categories of difference. Secondly, Aboriginal migrants challenge the dominant, territorially-defined, identity of the nation. By extending their identity across places to “maintain links with communities across borders and boundaries and formulate identities of belonging to more than one place,”⁴¹⁹ these individuals contest the traditional view of territory as composed of ‘separately bounded spaces’ of cultural difference. If we understand the fixing of the body in space as a way in which human societies ‘conceptualise the passage of time’⁴²⁰, then the movement of the Aboriginal body out of place and into the open space contests the timeless

⁴¹⁴ Denis Byrne, “Nervous Landscapes: Race and Space in Australia,” in *Making Settler Colonial Space: Perspectives on Race, Place, and Identity*, ed. Tracey Banivanua Mar and Penelope Edmonds (New York: Palgrave Macmillan, 2010), p 170.

⁴¹⁵ Edward S. Casey, “Between Geography and Philosophy: What Does It Mean to Be in the Place-World?,” *Annals of the Association of American Geographers* 91, no. 4 (2001): p 684.

⁴¹⁶ Evelyn Peters, “‘Our City Indians’: Negotiating Meaning of First Nations Urbanisation in Canada 1945-175,” *Historical Geography* 30(2002): p 79.

⁴¹⁷ See fig. 2.2 on p. 88

⁴¹⁸ Or, as Peters notes, some of them believe that the Reserve does not afford them adequate employment, educational, and access to medical care, and thus a decision to leave the Reservation is also shaped through their experiences of economic and social inequalities. See, Evelyn Peters, “‘Our City Indians’: Negotiating Meaning of First Nations Urbanisation in Canada 1945-175,” *Historical Geography* 30(2002): p 79.

⁴¹⁹ Kathi Wilson and Evelyn J Peters, “You Can Make a Place for It”: Remapping Urban First Nations Spaces of Identity,” *Environment and Planning D: Society and Space* 23, no. 3 (2005): p 395.

⁴²⁰ See my earlier discussion on corporeal emplacement in Chapter One, p 46.

dualism of modernity and traditionalism, to which we have grown accustomed, and against which the Reserve is imagined and constructed. As such, Aborigines who move off the reservation are believed to have forsaken their Aboriginality. We can see evidence of this view by referencing, for one, how Canadian Aborigines face a severe limitation on their treaty rights if they are to relocate to the city,⁴²¹ and secondly, by their inability to participate in band elections, impeding their right to have a say on issues involving the use of band money and lands.⁴²² Though constitutionally recognised as citizens of one nation-State the rights of Aborigines are more stringently shaped (in comparison to non-Aboriginal citizens) by the space that their body occupies. Moreover, their right to mobility within the territory of the State is also more strictly regulated than non-Aborigines. In linking mobility to a rejection of one's Aboriginal identity, the law is suggesting that being Aboriginal means remaining static and passive. The Reservation inverts the conventional belief that human beings cultivate their space in ways that are consonant with their self-identity. Instead, the Reservation appears to devalue human agency in suggesting that it is the space that the native body occupies which determines and gives meaning to his/her identity.

Certainly there is the argument that the Reserve system is necessary for implementing an Aboriginal right to self-determination, which requires a particular space within which that right can be effectively enabled. The Reserve represents one of the most effective means by which States can permit competing orders to coexist in accordance with their own normative traditions and consistent with liberal law. A counter-argument to this is that States use Aboriginal Reserves and territory-based rights of self-government to justify an unequal extension of liberal law to Aboriginal citizens. For example, many women's rights organisations have argued that, by granting territorial-autonomy or cultural communities the right of

⁴²¹ Kathi Wilson and Evelyn J Peters, "You Can Make a Place for It": Remapping Urban First Nations Spaces of Identity," *Environment and Planning D: Society and Space* 23, no. 3 (2005). Wilson and Peters note how the unequal application of the law is being concealed through the implementation of scales of governance in relation to Aboriginal treaty rights. They assert that scales of governance have the effect of constituting "First Nations women as individuals with Aboriginal rights only on reserves, and as part of mainstream society in urban areas. The assumption in these arrangements was that when First Nations people moved off reserves and into cities, they became part of the mainstream population, governed like other Canadian citizens." Aboriginality appears to be intrinsically linked to their positioning in a separate and divided space. The extension of treaty rights to off-reserve Indians is something that has very recently been decided by the Canadian courts in Daniel. See, *Daniels V. Canada*, 6 F.C.R.(2013).

⁴²² *Indian Act (R.S.C., 1985, C. I-5)*, s. 77(1). *Indian Act*, s.77(1); *Corbiere V. Canada (Minister of Indian and Northern Affairs)*, 2 SCR 203(1999). The Federal Court of Appeal upheld the Trial Court's decision that s.77(1) of the Indian Act was invalid under s.15 of the Charter. And so, now, off-reserve Aborigines are able to participate in band elections. However, sometimes this is a mere paper-right given that some bands require all Aborigines to be physically present in order to participate in elections which often negates the value of the right given that this is unfeasible for many off-reserve members.

exclusive jurisdiction over certain legal areas, the State often employs a hands-off approach in protecting their Aboriginal citizens' constitutional rights.⁴²³

But what is most problematic about the Reservation system is that it insinuates that these spaces represent self-invoked, *voluntary* forms of racial segregation based on an Aboriginal quest for self-determination and a desire to live in accordance with Aboriginal normative systems. Using the example of racial segregation in America, Ford analyses how political geographies that produce certain distributions of race in space (i.e. ghettos, ethnic neighbourhoods) are often interpreted as acts of racial solidarity, rather than the product of unfair or unequal distributions of political and economic resources or power. The assumption is made that members of a particular minority have *freely chosen* to set themselves apart from the majority, and that the State should respect and accommodate that choice. He notes that, "[r]ace-neutral policies, set against an historical backdrop of State action in the service of racial segregation and thus against a contemporary backdrop of racially identified space – physical space primarily associated with and occupied by a particular racial group – predictably reproduce and entrench racial segregation and the racial-caste system that accompanies it."⁴²⁴ An unequal application of the law to communities living on the Reserve avoids political and academic reproach because it is believed that these jurisdictional boundaries simply represent pre-existing residential patterns and designs of pre-colonial occupation. Consequently, these boundaries are naturalised and their active role in manipulating where native communities live and act is concealed.⁴²⁵ These policies have an effect similar to the colonial mapping of reserve lands in the late eighteenth century,⁴²⁶ in that they normalise (even commend the 'benevolent' nature) of State-instituted cultural boundaries, projecting them as natural and pre-political realities that have been recognised and protected by the State.

ii. *Aboriginal Mobility and the Australian 'Desert-lands'*

While there is some merit to the claim that place and identity are intimately related,⁴²⁷ given that our sense of self is partially determined by corporeal emplacement,⁴²⁸ linking Aboriginality

⁴²³ Ayelet Shachar, "Reshaping the Multicultural Model: Group Accommodation and Individual Rights," *Windsor Review of Legal and Social Issues* 8(1998). Goel, for example, highlights jurisdictional issues and the use of sentencing circles to resolve issues of domestic violence on Reserves, which may support the claims of women's rights organisations that States cannot adopt a non-interventionist approach to cultural autonomy. Rashmi Goel, "No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases," *Wis. Women's LJ* 15(2000): p 295.

⁴²⁴ Richard Thompson Ford, "The Boundaries of Race: Political Geography in Legal Analysis," *Harvard Law Review* 107, no. 8 (1994): p 1844.

⁴²⁵ *Ibid.*: p 1845.

⁴²⁶ See p 87 of Chapter Two.

⁴²⁷ Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis: Minnesota University Press, 1977). Also see my earlier discussion on space and place in Chapter Two on p 53-54.

to space not only limits the movement of the Aboriginal body, but has the effect of erasing those spaces in which native movement *does* occur. For instance, the Aboriginal communities living within the Yankunytjatjara, Antikarinya, and Kokatha regions of Southern Australia subscribe to a nomadic lifestyle that has made permanent dwellings unnecessary. In addition, these communities used natural landmarks to determine location and direction, and so the practice of visibly 'naming' spaces became irrelevant. A lack of signage and domestic and commercial development, however, led the State to officially designate these regions as 'desert-lands', a label that had profound implications for a government-backed program for nuclear testing and nuclear-waste dumping in the area.⁴²⁹

In the absence of European measures of possession and development, namely the establishment of business or commercial enterprises and the use of signage to indicate the names of places, the Australian government effectively designated the Yankunytjatjara, Antikarinya, and Kokatha regions as uninhabited wastelands, blank spaces on an Australian map, and thus a prime location to carry out extensive testing of atomic weapons. After the Aboriginal community reported health-concerns from the radioactive toxicity of the testing, an inquiry found earlier studies had "*failed to take into account the existence of people*"⁴³⁰ in the area and no population survey had ever been carried out within the regions. Indeed the nomadic lifestyle of the Aborigines living in the area made it impossible to determine the boundaries of 'tribal country', which would have made the execution of a survey all the more difficult.

While serving as a particularly stark example of Aboriginal erasure, the case of the Yankunytjatjara, Antikarinya, and Kokatha regions is also significant because it gives us a rare glimpse into the ways in which Aboriginal communities resist externally developed categories of difference by reinterpreting them to argue that their unique cultural and historical experiences connected them to the land that they now occupy in ways that are inconsonant with European conceptions of space. Thus, they resist the external determination of their identity at the same time as refuting the notion of space that is put forth by their colonisers in doing so. In a set of published statements about the effects of nuclear testing in the area, the Aboriginal women of the region proclaim:

We are the Aboriginal Women. Yankunytjatjara, Antikarinya, and Kokatha. *We know the Country*. The poison the Government is talking about will poison the land...We were born on the earth, not in the hospital. We were born in the sand. Mother never put us in the water

⁴²⁸ See my earlier discussion in Chapter Two on corporeal emplacement p 43

⁴²⁹ Eve Vincent, "Never Mind Our Country Is the Desert," in *Making Settler Colonial Space: Perspectives on Race, Place, and Identity*, ed. Tracey Banivanua Mar and Penelope Edmonds (New York: Palgrave Macmillan, 2010), p 53-72.

⁴³⁰ *Ibid.*, p 63.

and washed us...We really know the land. From a baby we grow up on the land. Never mind our country is the desert, *that's where we belong* [emphasis added].⁴³¹

We see three important ideas emerge from this passage. First, geographic knowledge is understood as translating into political power. To *know* the land gives these women, as it did the European settlers, a certain degree of power over how that land is projected, interpreted, presented, and regulated. However, while they too perceived land as a symbol of political power, these women's narratives represent an attempt to reconcile the prominence of territory to political and legal discourse by using their own cosmologies. To know the land is *not the same as* developing and exploiting the land. While they too embrace a 'knowledge is power' dynamic, the way that that knowledge is acquired for the European in comparison to the Aboriginal is extremely different. The persistence of these differing cosmologies further exposes the socially-constructed nature of space, and confirms that multiple, though sometimes overlapping, conceptions can exist.

The second idea that becomes apparent through this passage is that we can clearly see that the Aboriginal women grasp and accept a model of space that is divisible, a distinct separation between settled space versus Aboriginal space – being born on the *land* and *not in the hospital*. Thus, their conception of space overlaps with the European model insofar as both conceive of space as culturally-divisible. Third, the passage makes us aware that the Aboriginal women understand the implications of designating their country a 'desert'. They are fully aware that the label transforms that space into something *less than* the developed settled spaces of the Europeans, yet they also accept that 'the desert' *is a place*, and claim that it is a place where 'they belong'. Thus the 'desert' appears as an empowering trope. They protest the inferior-status accorded to the label, and reclaim the desert as a place that is their home. Consequently, their announcement is less a protest against a cultural division between Aborigines and Europeans – for they clearly make evident that they do in fact believe that such a division exists – but rather a retaliatory statement against the idea that such a division demonstrates Aboriginal inferiority.

What is further interesting about this particular expression of protest is that space appears to have been not only *racialised* but also *gendered*. Pronouncements of protest were most strongly voiced by the Aboriginal women of the various tribes that populated the area, many of whom drew on their reproductive roles to further their claims on the land, and of the land. Tropes of regeneration and the Aboriginal relationship with 'mother' nature figured heavily in their statements of protest and opposition. Spatial relationships – the community's relationship with the earth, its sacred connection to the land – were important themes that emerged through the

⁴³¹ ———, "Knowing the Country," *Cultural Studies Review* 13, no. 2 (2007): p 157.

demands that were voiced, and they stood in stark contrast to the masculine tropes of discovery and rescue that underlay European claims to Australian land. These primordial connections were particularly potent representations of resistance because they challenged individualist and patriarchal Enlightenment thinking, reaffirmed the value of kinship identities, and raised objections to the State's formulation of a pan-Australian national identity.

However, the Aboriginal communities made an important trade-off over the course of this processes. While they resisted their erasure by confirming their difference, the idea of Aboriginal 'difference' is one that has been *imposed* on them by those external to the community. While many Aboriginal communities have always had a deeply terrestrial sense of self, in the sense of being strongly connected to the land that they occupy,⁴³² from the passage quoted it is possible to identify their affirmation of a connection between space and "government", and space and "country", and their affirmation of the significance this relationship, in some ways, draws into European political ideology. Thus, though they may see their connection to land as being more natural, maybe even less contrived, they view this connection as a relationship of power that they articulate using the concepts and institutions developed by their colonisers. From this reading it is questionable whether these communities have left to them an authentic way of being different, or forms of resistance that are able to transcend the powerful forms of misrepresentation brought about through the operation of Occidental Legality.

E. Protecting the 'Pristine Wilderness'

Australian and Canadian Governments continue to draw on tropes of 'pristine wilderness' in the context of shaping native-dominated geographies. Through the mobilisation of these models of space, these governments have been able to empty places of their normative content, and effectively prevent Aboriginal communities from accessing these spaces. The impact of biodiversity discourse and the construction of ecological 'protected areas' is one such example of how notions of wilderness have disproportionately disadvantaged Aboriginal communities. While there are legitimate arguments to be made about protecting biodiversity, namely that it is a public matter for the good of the nation as 'a whole', the standards by which wilderness is 'discovered' and conceptualised suggest the use of European referents of development and proper land usage, and sometimes emerge from a violent means of clearing the land so as to 'preserve' the pristine landscape. Both of these forms of argument use ideas about ecology and biodiversity in ways that disproportionately limit areas of Aboriginal occupation and use.

⁴³² Tracey Lindberg, "The Doctrine of Discovery in Canada," in *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, ed. Robert J. Miller, et al. (Oxford University Press, 2010), 89-90.

In both Canada and Australia the collaboration between political and legal institutions and 'wilderness' and biodiversity discourse has had the effect of converting Aboriginal land into 'protected areas' controlled by the State, often without consultation with resident or affected Aboriginal communities.⁴³³ Mar investigates how the legal and political institutions and structures work together to preserve the view of certain spaces as pristine wilderness needing protection through the division and enclosure of the area as a national park. The Bunya Mountains National Parks represents one particular example of how the notion of 'wilderness' was "violently, legislatively, and spatially produced *before* it could be preserved [emphasis added]."⁴³⁴ The bunya forests were occupied by Aboriginal communities who had a millennia-long tradition to gather and celebrate the harvest of bunya nuts every three years. The last known gathering was in 1902, after which large scale colonisation and settlement in the nineteenth century pushed these groups out of the area and into Reservations. In turn, the forests were defined as uninhabited wilderness, and were later protected as national parks.⁴³⁵

Canada, for the most part, has pursued policies of ecological conservation by negotiating with Aboriginal communities living in protected-areas. However, as Stevenson notes, many of these agreements privilege the State-sponsored schemes for conservation and end up "marginalising and muting Aboriginal systems of management, knowledge, authority, and responsibility that have proven sustainable for generations."⁴³⁶ The subordination of Aboriginal traditional practice to Anglo-European epistemological systems gives the impression that the State is in a better position to safeguard land that has been protected and managed by Aboriginal communities for thousands of years before European contact. Space is racialised through an emphasis on ecological crises, renewable resources management, and environmental degradation, and "Aboriginals are implicated in either creating or contributing to the problem through overhunting or misuse."⁴³⁷ Consequently, co-management agreements tend to curb Aboriginal access to resources and impede their ability to engage in traditional land-use activities, as well as stigmatising them as a barrier to an important public good of ecology. In

⁴³³ See for example, Bill C-38 and Bill C-45 in Canada, which contain amendments to the Canadian *Navigable Waters Protection Act* and *Fisheries Act* and other environmental legislation that will allow the Federal Government to implement environmental projects without taking into account First Nations' rights, title, or interests, and redefine key aspects of Aboriginal custom and identity (as per the *Fisheries Act*). See, "Jobs, Growth, and Long-Term Prosperity Act," in *Bill C-38* (Canada: Canadian Parliament, 2012). Also see, "Amendments to the Criminal Code Affecting the Criminal Liability of Organisations," in *Bill C-45*, ed. Federal Government of Canada (2012).

⁴³⁴ Tracy Banivanua Mar and Penelope Edmonds, eds., *Making Settler Colonial Space: Perspectives on Race, Place, and Identity* (New York: Palgrave Macmillan, 2010), p 9. See, Tracey Mar, "Carving Wilderness: Queensland's National Parks and the Unsettling of Emptied Lands, 1890-1910," in *Making Settler Colonial Space: Perspectives on Race, Place, and Identity*, ed. Tracey Banivanua Mar and Penelope Edmonds (New York: Palgrave Macmillan, 2010), p 73-94.

⁴³⁵ Anna Haebich, "Assimilating the Bunya Forests," *Aust NZ Forest Hist* 2(2005).

⁴³⁶ Marc G. Stevenson, "Decolonising Co-Management in Northern Canada," *Cultural Survival Quarterly* 28, no. 1 (2004): p 68.

⁴³⁷ *Ibid.*: p 17.

juxtaposing the 'science' of ecological conservation alongside a 'careless' exercise of traditional practice, biodiversity discourse draws on conventional tropes of primitiveness to represent Aboriginal land-use. In some cases Aboriginal communities have been forcibly displaced in pursuit of 'environmental protection',⁴³⁸ demonstrating a manipulation of postcolonial space to not only 'make room' for others, but to neutralise it of all human inhabitation all together. Like colonial ethnography and cartography, the discourse of biodiversity conservation, itself underpinned by an entire corpus of environmental protection law, collapses European experience with epistemology and disempowers Aboriginal communities by limiting their capacity to control the land that they live on.

Apart from limiting Aboriginal access to the spaces that they have traditionally occupied, in defining and safeguarding spaces as 'protected areas', biodiversity discourse and legislation suggests that certain spaces need to be protected from and cleansed of the native body. We are given the distinct impression that the Aboriginal body *contaminates* space. Drawing on the tropes of degeneration and pollution, biodiversity discourse employs rhetoric similar to the previously discussed discourse of tropicity. In so doing, the creation of the 'protected areas' not only neutralises the space of its normative content, but works to construct a new imagined geography. The pristine wilderness encompassed within the legal construction of the 'protected area' appears as the 'nostalgic' history of colonialism that Gregory cautions us against.⁴³⁹ The invocation of a 'pristine' geography of the past, a geography untrammelled and unspoilt by the violence and injustice of the colonial encounters, is ironic given that its creation, in many cases, is one borne out of violence.

5. Anxieties of Proximity

Through the narratives discussed in Chapters Two and Three, it appears as if territory coalesces from the fear of hybridity and in-betweenness. Thus, the bounded, owned, and culturally-divisible notion of space that emerges through these narratives, draws on the idea of 'distance', and the need to maintain distance between culturally diverse communities in order to prevent hybridity and intermixing. We can recognise this preoccupation with distance through, for example, the severe tropes of modern/pre-modern, ordered/chaos, and civilised/savage that characterise many of these narratives. For example, witnessing narratives of the natural environment often represented natives as diseased and decaying facets of the 'tropical' spaces

⁴³⁸ Dawn Chatty and Marcus Colchester, *Conservation and Mobile Indigenous Peoples: Displacement, Forced Settlement, and Sustainable Development*, vol. 10 (UK: Berghahn Books, 2002). Also see, Marcus Colchester, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation*, vol. 55 (Diane Publishing, 1994).

⁴³⁹ D. Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Malden, MA: Blackwell, 2004), p 9.

they occupied. This theme of native contamination is further drawn on in narratives of biodiversity and ecological conservation, where native practices are understood as depleting and destroying the environment. Similarly, we also find evidence of colonial and later postcolonial forms of governance attempting to define and contain native identities and bodies. In colonial India we see this taking the shape of colonial agents 'mimicking' native culture in attempt to redefine and 'tame' native alterity. In the context of Canada and Australia, we see the courts adopting the role of defining native identity and containing native culture through geography, both in cases of Aboriginal title, as well as the development of the Reservation system.

Every so often, however, these narratives produce contradictory images that describe the same scene, phenomenon, and identity in two irreconcilable ways. It is for this reason that we often find conflicting observations about the tropicity of a particular space.⁴⁴⁰ It is also for this reason that legal narratives, in the form of judicial decisions, embody a disjuncture. On the one hand they demonstrate uneasiness with the 'closeness' of the racialised Other and thus use space to divide social groups and isolate their interactions. At the same time, however, the courts also affirm the political and legal equality of native and mainstream societies. These anxieties of proximity emerge from the compression of space, when time and distance become meaningless. And so, in the end, they trigger strategies to *create distance* between proximally located social groups.

As Williams and Smith note, geographic space is *limited* and enclosures of space have historically had the specific aim of "maximis[ing] limited, available space."⁴⁴¹ As a consequence of modernity's compression of space and time, social conflicts have the potential to become more fierce as the terrain on which they play out becomes smaller and smaller. As the preeminent political authority of modern times, the State's existence depends, to a large extent, on its capacity to maintain its territorial integrity by limiting and mediating conflicts of diversity and accessibility.⁴⁴² As a result, Colin Perrin believes that postcolonial politics can be characterised by "a certain excess...of modernity" which produces "ineffability and indecision" in

⁴⁴⁰ See my earlier discussion in Chapter Two p 93.

⁴⁴¹ Colin Williams and Anthony D. Smith, "The National Construction of Social Space," *Progress in Human Geography* 7(1983): p 503. Indeed there has been the counter-argument that geographic space is also *expanding* given marine-based and interplanetary exploitations. See, J. Gottman, *The Significance of Territory* (Virginia: University of Virginia Press, 1973). But, here, I am concerned with geographic space in the form of inhabitable space (i.e. land).

⁴⁴² What Williams and Smith call 'shelter for security' and 'springboard for opportunity.' See, Colin Williams and Anthony D. Smith, "The National Construction of Social Space," *Progress in Human Geography* 7(1983): p 503.

how political authorities manage these conflicts.⁴⁴³ He believes that these instances of indecision emanate from, what he calls, the political entity's 'anxieties of proximity.'

From this view, court judgments and politico-legal discourse become strategies of social distancing as well as narratives of witnessing, the 'witnessing' of diversity and plurality and of the ways in which societies have tried to come to terms with and process the closeness of alterity. As such, these narratives of witnessing reveal their own inconsistencies as they try to tame the alterity of the 'legal space'. Social difference is collapsed into normative difference and both are seen as linked to territorial space. These narratives try to make sense of what is being observed by applying 'what they know'. In that sense we can see common law principles being applied to Aboriginal rights claims, and particularly Aboriginal demands for unencumbered control over land. We also see the courts drawing on other forms of 'European knowledge', such as their use of researchers in anthropology, sociology, and genealogy to define and give voice to Aboriginal identity by using ideas intelligible to the common law and its notion of legal subjectivity (i.e. *Delgamuukw*).⁴⁴⁴

At the same time, however, it is questionable whether any form of colonial signification can ever fully articulate the subject of cultural difference, or whether those articulations always emerge as "colonial nonsense...that displaces those dualities in which the colonial space is traditionally divided: nature/culture, chaos/civility..."⁴⁴⁵ Bhabha suggests that the subject produced through colonial signification – which "are intimations of cultural otherness" – is always hybrid, a subject in-between cultures.⁴⁴⁶ It is something 'other' than the European, and yet it bears the imprint of European witnessing by virtue of it being 'represented' by the viewer. And thus, to some extent, as Said would argue, these representations say more about the viewer than they do about what and whom is being observed.

Accordingly, the 'legal nonsense' – by which I mean the law's propensity for uncertainty, the constant vacillation between unity and differentiation, the continuous affirmation of progress alongside backwardness – may, in fact, symbolise the law's "recognition of an anxious contradictory place between the human and non-human, between sense and non-sense."⁴⁴⁷ It points to the idea that 'culture' remains an unstable category precisely because it is not based on reality, but a particular representation of it. Perhaps then what Bhabha is pointing to is the

⁴⁴³ Colin Perrin, "Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous People," *Law and Critique* 4, no. 1 (1995).

⁴⁴⁴ *Delgamuukw V. British Columbia*, 3 S.C.R 1010, para. 5, 85 (1997).

⁴⁴⁵ Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994), p 177.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid., p 178.

idea that the ambivalence projected by colonial signification may in fact signify a *dislocation* of culture as a category. Accordingly, the problem of cultural difference is *not* caused by plurality. The actual problem lies in the fact that the object of culture [Europeanness] disappears momentarily, it is for an instant unrecognisable in that very moment of signification because the subject and object of culture merge. Cultural difference is both alarming and fascinating because of our fear of synthesis, of becoming unrecognisable to the self. Thus, in the attempt to manage our anxieties of proximity, one has to wonder if we recreate exactly that which we most fear – the hybrid.

This, Bhabha notes, is the ‘enunciatory disorder of the colonial present.’ In the destruction of the category of culture, *cultural difference* becomes difficult to sustain. It is not simply that its significance is diminished, but that its claim of specificity is rendered entirely redundant. While these expressions of anxiety have been present from the time of the first European settlements, they were at first, managed through simpler forms of impressing distance on normative communities occupying the same social space. They later became progressively more restrictive to outsider access. Social distance was, at first, implemented through the imagining of separate temporal domains of interaction, and visualising the primitivity of the native. Sometime later this was replaced by symbolic markers of possession of space (flags, crosses, sermons)⁴⁴⁸ which impressed distance by claiming exclusive access and rights to space, and later these too were replaced by more forceful and more stringently regulated markers of possession, including forts, fences, and boundaries, which were policed and defended against transgressive performances of space (i.e. of Others crossing over and living amongst the settled population). From this reading, it appears that markers of possession, of ‘ownership’, become stricter when definitions of the self need to be more fully articulated because distance between the self and Other is shortened. Societies implement more rigid orderings of space when there appears to be a crossing-over of cultures, of racial or cultural miscegenation and intermixing.

Thus, these anxieties of proximity are heightened by the dissonance that is made manifest through these demands for jurisdictional negotiations. As societies are brought together under a *shared* political space, where they (theoretically) have an equal potential to influence social action and relations, new ways of creating distance become necessary to alleviate these anxieties of proximity. This impulse to spatialise power by imposing distance in order to maintain cultural difference and prevent racial mixing, is something that the dialogical relationship between law and geography makes less visible to us. The processes of Occidental

⁴⁴⁸ Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (Cambridge, UK: Cambridge University Press, 1995). Also see, Moana Jackson, "Globalisation and the Colonising State of Mind," in *Resistance: An Indigenous Response to Neoliberalism*, ed. Maria Bargh (Wellington, NZ: Hart, 2007), p 169.

Legality which take place through cartography, ethnography, and structures of political and legal governance reproduce legal geographies characterised by a bounded, owned, and culturally-divisible notion of space. The use of these legal geographies to manage issues of cultural and legal pluralism has the effect of further marginalising and distancing proximally located Others in order maintain the illusion of cultural purity.

6. Aboriginal Perspectives on the Relationship between Law, Land, and 'Territory'

One of the contemporary challenges of living in a society ordered by legal and political systems associated with European imperialism relates back to how multicultural societies can use existing models to better protect, encourage, and preserve non-European cultural practices, traditions, and modes of living. This becomes a further complicated exercise when one takes into account the reality that, historically, native ways of being and thinking have needed protection from precisely those systems that are now being employed to enhance their social, political, economic, and cultural standing.⁴⁴⁹ As Ivison, Patton, and Sanders contend, "where does this leave indigenous political thought and indigenous understandings of their rights to land, culture, and self-rule?" The question that they pose, and that also lies at the heart of the many debates presented in this thesis, is whether "liberal democracy [can] become genuinely intercultural."⁴⁵⁰ This has been one of the existing problems of colonialism that has been highlighted by a number of indigenous scholars, some of whom claim that colonialism has produced a situation in which North American indigenous groups "cannot even begin a conversation without referencing [their] words to definitions imposed or rooted in 1492 [Columbus' arrival in America]."⁴⁵¹

Historically, modern political theory has trumpeted rights of cultural autonomy, collective freedom, universal human rights, and equality before the law while, at the same time, withholding these rights from Indigenous groups. The first two chapters of this thesis have demonstrated how the notion of territory has been specifically implicated in the simultaneous granting and withholding of rights.⁴⁵² Through the territorial organisation of modern social and political relations, Western political and legal thought has "embodied a series of culturally

⁴⁴⁹ See, J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge Univ Pr, 1995), p 35. Also see, Larry Chartrand, "The Story in Aboriginal Law and Aboriginal Law in the Story: A Metis Professor's Journey," *Supreme Court Law Review* 50(2010): p 95. For some Aboriginal authors the historical implication of liberal law in Aboriginal dispossession, dislocation, and cultural domination means that it may never be possible to fully resolve the conflict between one's cultural identity as an 'Aboriginal' and political identity as a 'citizen'. See, Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Winnipeg, MB: Fernwood Publishing, 1999).

⁴⁵⁰ Duncan Ivison, Paul Patton, and Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge, UK: CUP, 2002), p 1.

⁴⁵¹ William Baldrige as quoted in Jace Weaver, "Indigeneousness and Indigeneity," in *A Companion to Postcolonial Studies*, ed. Henry Schwarz and Sangeeta Ray (Oxford, UK: Blackwell, 2005), p 222.

⁴⁵² Specifically, consider my discussion of de Vitoria on pg 115

specific assumptions and judgements about the relative worth of other cultures, ways of life, value systems, social, and political institutions, and ways of organising property.”⁴⁵³ Despite a growth in egalitarian thinking these assumptions have, as Ivison, Patton, and Sanders note, produced unjust and inequitable political and legal institutions and practices.

One way in which contemporary societies can try and address this conflict between thought and action is by drawing in these traditionally displaced cultural perspectives in developing modes of regulation and forms of governance. I consider some of these in the last chapter of the thesis, during my discussion on Aboriginal traditional knowledge and ecological protection, and Tully’s idea of pluralistic constitutionalism.⁴⁵⁴ Recently, in Canada, the Courts have served as an important forum in which these struggles have played out. They have taken the form of Aboriginal concerns related to the protection of their traditional ways of life, the restoration of their rights-claims in land, the recognition of their right to exercise Aboriginal self-government, and demands for compensation for the historical and continued wrongs that they have suffered under an alien government. Consequently, one can argue that land, while it may have been historically important for the development of indigenous identity and the practice of indigenous custom it has become even more so relevant for indigenous groups today. This is because it forms an essential component of Aboriginal peoples’ legal claim for recognition of their sovereignty and right to self-determination, and a mechanism by which to ensure their economic and political independence. In this section I want to highlight and discuss Canadian-Aboriginal conceptions of geography, land, and territory, to map points of convergence that can serve as potential sites for future dialogue, and areas of divergence which need to be addressed by the contemporary legal and political institutions and processes of liberal societies.

As I noted earlier in the thesis, it is not my intention to minimise the pluralism of Aboriginal communities by referring to these views as ‘Aboriginal conceptions’ or ‘Aboriginal perspectives’.⁴⁵⁵ I use the term, simply, as a way of categorising a set of non-European, indigenous, geographic and spatial views. Nonetheless, in order to provide some common (historical, political, and social) grounds upon which to analyse these perspectives, I have elected to focus this section of the Chapter on studying mostly Canadian-Aboriginal perspectives. It is not entirely unexpected that these views may have little resonance for Aboriginal groups elsewhere in the world, given their divergent political and social histories. In spite of this, however, I think these ideas have currency in terms of outlining some of the common struggles

⁴⁵³ Duncan Ivison, Paul Patton, and Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge, UK: CUP, 2002), p 2.

⁴⁵⁴ See p 259-61.

⁴⁵⁵ See FN 14

across the globe for Aboriginal groups claiming political and legal autonomy through the analytic of territory.⁴⁵⁶

The analysis undertaken over the course of this section reveals some interesting insights that reinforce the argument that the concept of territory – as bounded, owned, and culturally divisible – structures State-Aboriginal relations in such a way so as to divest Aboriginal peoples of not only their land, but also their dignity and rights to political and legal autonomy. While the relationship between Aboriginal peoples and their land is uniquely different from the European model I have expanded on thus far – land, geography, and environment are still essential components of Aboriginal peoples' identity and these relationships form the basis of their political and legal organisation. Certainly access to and control over land serves as an important rationale for Aboriginal peoples' continued struggle against the Canadian State. But what is most interesting is that this struggle is wrongly construed in Canadian courts as being territorial in nature, with territory having all the connotations we conventionally apply to land as property, as enclosures of owned space. Since the dominant political view is that a State's territorial borders are sacrosanct, the characterisation of Aboriginal peoples' desire for greater autonomy in territorial terms forecloses discussion between the State and indigenous groups. Consequently, it is questionable whether a territorial vision of space can ever genuinely empower Aboriginal peoples when it simultaneously circumscribes their rights to land by continuously reiterating the myth of unencumbered Crown sovereignty.

In analysing Aboriginal perspectives on land and the natural environment, and how their political and legal struggles today relate to their relationship to ancestral lands, it becomes apparent that the source of Aboriginal discontent cannot be entirely attributed to theft of land.⁴⁵⁷ Certainly, one can argue that much of their traditional lands were voluntarily ceded to the Crown in exchange for various forms of monetary and non-monetary compensation (which I will discuss in a moment). Instead, their resentment and frustration can be traced to the fact that the transfer of land to the Crown commenced a relationship of reciprocal obligation, which

⁴⁵⁶ Alfred and Corntassel suggest as much in declaring that Indigenous groups globally face a similar set of challenges in trying to maintain their cultural heritage and traditional practices in the face of foreign opposition. They claim that it is this "oppositional, place-based existence, along with the consciousness of being in struggle against the dispossessing and demeaning fact of colonisation by foreign peoples, that fundamentally distinguishes Indigenous peoples from other peoples of the world." See, Taiaiake Alfred and Jeff Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism," *Government and Opposition* 40, no. 4 (2005): p 597.

⁴⁵⁷ While it is beyond the scope of this thesis to undertake a focused critique of the many ways in which the usurpation of Aboriginal lands was an unequal and unjust process that disproportionately benefitted the colonising society, such appraisals can be located in a number of historical, legal, and sociological studies which are important further avenues for research. Michael Blumm, "Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance for Treaty-Making and Modern Natural Resources Policy in Indian Country," *Vermont Law Review* 28(2004). Also see, Cole Harris, "How Did Colonialism Dispossess? Comments from an Edge of Empire," *Annals of the Association of American Geographers* 94, no. 1 (2004).

Canada now refuses to uphold or outright denies.⁴⁵⁸ The perception amongst many Aboriginal people is that, now, as Aboriginal peoples' bargaining power is significantly lessened by the fact that they no longer possess land, the original terms of their independence and protection of their cultural identity are being heavily circumscribed by the State. It is this unwillingness of the State to negotiate with the Aboriginal peoples of Canada as the self-governing nations they once recognised them to be, is precisely what many Aboriginal groups in Canada are seeking to rectify through litigation. Accordingly, contemporary claims for Aboriginal rights and title are not necessarily demands for land as property, but demands for the right to administer their lives independent from external intervention; they are demands for recognition of sovereignty, as "the inviolable expression of a people's collective identity, transcending the particulars of time and space."⁴⁵⁹

A. Land, Aboriginal Identity, and Reciprocal Relations of Sovereignty

The gathering and circulation of knowledge about land, as I demonstrated in Chapter Two, has been a paradigmatic marker of European political and cultural power since the early fifteenth century. Exercising control over space through not only material practices like building fences, homes, and military posts, but also discursive processes such as producing maps, surveys, and travel narratives, represented the exercise of European political and cultural authority over populations that were conquered. Witnessing narratives were one way in which European travellers and political agents were able to exercise greater discursive and political power over the *newness* of the colonised space and its unfamiliar occupants. It was a way in which they could not only categorise and regulate native populations, but also a method by which they could affirm, project, and circulate their own self-identity.

Features associated with land – topography, climate, and ecology – have also been important markers for the development of Aboriginal self-identity. According to the cosmologies of many Aboriginal peoples, the natural environment informs their sacred, intellectual and ethical frameworks. As Vine Deloria notes "the structure of their [Aboriginal] religious traditions come

⁴⁵⁸ Coulthard refers to this as 'grounded normativity'. He writes that while it is the "primary experience of dispossession...[that] tends to fuel the most common modes of indigenous resistance to and criticism of the colonial relationship itself...struggles that are best understood as struggles around the question of *land*" these struggles are not simply about access and ownership but about "what land as a mode of reciprocal *relationship* (which is itself informed by place-based practices and associated form of knowledge), ought to teach us about living our lives in relation to one another and our surroundings in a respectful and non-dominating and nonexploitative way." See, Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), p 60.

⁴⁵⁹ J. Edward Chamberlain, "Culture and Anarchy in Indian Country," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: University of British Columbia Press, 2002), p 12.

from the world around them.”⁴⁶⁰ Spatial awareness has always been a crucial component of Aboriginal philosophy and, as Deloria mentions, “all their statements are made with this reference point in mind.”⁴⁶¹ He contrasts this with how Euro-Western society is more focused on history and time as the crucial narrative underwriting their perceptions and understandings of the world.⁴⁶² Land has a religious and intellectual significance for Aboriginal peoples that cannot be distinguished separately from the political and economic arrangement of their society. As Deloria explains:

The vast majority of Indian tribal religions, therefore, have a sacred centre to a particular place, be it a river, a mountain, a plateau, valley or other natural features. This centre enables the people to look out...and locate their lands, to relate all historical events within the confines of this particular land, and to accept responsibility for it. Regardless of what subsequently happens to the people, the sacred lands remain as permanent fixtures in their cultural or religious understanding.⁴⁶³

These ‘sacred centres’ then serve as ceremonial sites, and become forever forged with the development of special communal relationships amongst members.

According to other Aboriginal cosmologies, land is perceived as if it were a living entity which informs and influences human activity and behaviour. According to Lindberg, the Earth is perceived as a ‘mother’, birthing and nourishing all people of the Earth.⁴⁶⁴ This gives rise to a unique relationship of non-ownership and mutual obligation between Aboriginal peoples and their environment.⁴⁶⁵ In some instances perceiving land as an animate entity has given rise to a duty to protect what some (like the hereditary Chiefs of the Gitksan and Wet’suwet’en People in *Delgamuukw*) have referred to as “a spirit in the land.”⁴⁶⁶ The land, as Coulthard explains, is:

Understood [by Aboriginal peoples] as a field of ‘relationships of things to each other.’ Place is a way of knowing, of experiencing, and relating to the world and with others; and sometimes these relational practices and forms of knowledge guide forms of resistance

⁴⁶⁰ Vine Jr. Deloria, *God Is Red: A Native View of Religion* (New York: Putnam, 2003), p 66.

⁴⁶¹ Ibid., p 61.

⁴⁶² Ibid., p 62.

⁴⁶³ Ibid., p 66.

⁴⁶⁴ Tracey Lindberg, “The Doctrine of Discovery in Canada,” in *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, ed. Robert J. Miller, et al. (Oxford University Press, 2010), p 89-90.

⁴⁶⁵ The preposterousness of land ‘ownership’ is relayed poignantly in Nadasdy’s narrative about an Aboriginal woman belonging to the Kluane First Nation. In response to her grandson’s claim that he was working to resolve a land claim dispute by determining what land belonged to the First Nations and what land was the property of the white man, she retorts that this “...was a crazy thing to do, for no one can own the land – neither white men nor Indians; we move around; we die. How can anyone own it?” See, Paul Nadasdy, “‘Property’ and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations,” *American Anthropologist* 104, no. 1 (2002): p 247.

⁴⁶⁶ Gisday Wa and Delgamuukw, *The Spirit in the Land: Statements of the Gitksan and Wet’suwet’en Hereditary Chiefs in the Supreme Court of British Columbia, 1987-1990* (Gabriola, BC: Reflections, 1992).

against other rationalisations of the world that threaten to erase or destroy our sense of place.⁴⁶⁷

The Euro-Western vision of land as property to be owned, distributed, regulated, culturally-divided, enclosed, and made inaccessible, undermines the very conception of land and its promotion of reciprocity, cooperation, and mutual obligation integral to the Aboriginal worldview. As Nadasdy explains, “[t]he legal (and cultural) concepts of ‘ownership’ and ‘property’ recognised by Canadian courts and lawmakers cannot adequately represent the complexities of [the] relationship” that Aboriginal peoples have with the land and its living and inanimate resources.⁴⁶⁸ The forced and involuntary dispossession of Aboriginal peoples of their traditional lands is therefore perceived as a direct attack on their sense of place, belonging, and identity. In response to lands that were involuntarily obtained, the Aboriginal peoples of Canada feel that their right to access, use, and regulate the lands in question must be restored or, at minimum, renegotiated.⁴⁶⁹ The voluntary transfer of land from Aboriginal peoples to European settlers,⁴⁷⁰ which many could describe as a generous arrangement to shared access and regulation of their land, connects both the Canadian government and the Aboriginal peoples of Canada to one another in a relationship of joint obligation and mutual respect. In the Euro-Western tradition this relationship has been epitomised in the drawing up of treaties. The issue that permeates both of these discussions, however, is the misrecognition, or failure to recognise, Aboriginal peoples’ sovereignty. In the first situation, there has been a failure to recognise Aboriginal peoples as self-governing nations with an interest in, and a right to land. In the second instance, while the initial recognition of their nationhood is clear given the drafting of treaties between the two parties, it appears that the government is justifying their failure to uphold their treaty obligations by compelling Aboriginal groups to redefine their relationship to land in Euro-Western terms. For many Aboriginal peoples’ this is an unsatisfactory constraint on their right as sovereign and equal nations, and a violation of their human rights under a number of international human rights instruments.⁴⁷¹

⁴⁶⁷ Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), p 61.

⁴⁶⁸ Paul Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations," *American Anthropologist* 104, no. 1 (2002): p 248.

⁴⁶⁹ Michael Asch, "To Negotiate into Confederation: Canadian Aboriginal Views on Their Political Rights," in *We Are Here: Politics of Aboriginal Land Tenure*, ed. Edwin N. Wilmsen (Berkeley: University of California Press, 1989), p 119.

⁴⁷⁰ As Henderson suggests, perhaps a better explanation would be *land settled through acquiescence*, "sometimes by treaties, often grudgingly by physical occupation, occasionally by martial force, and slowly by European immigrants creating colonial societies as enclaves within an Aboriginal world." See, James (Sakej) Youngblood Henderson, "First Nations Legal Inheritance in Canada: The Mikmaq Model," *Manitoba Law Journal* 23(1995): p 1.

⁴⁷¹ Larry Chartrand, "The Story in Aboriginal Law and Aboriginal Law in the Story: A Metis Professor's Journey," *Supreme Court Law Review* 50(2010): p 109.

i. Territory and its Denial of Aboriginal Sovereignty

A key feature of the political and legal disputes that are currently arising between Canada and her Aboriginal peoples, is that territory has become the lens through which Canadian sovereignty is confirmed, and Aboriginal dependence explained. Territory operates to naturalise Canadian sovereignty. Chartrand explains this relationship between territory and the denial of Aboriginal peoples' independence when he states:

...under common law the interest in land that Aboriginal peoples occupy is not a territorial form of sovereignty. This is an important distinction. Aboriginal title claims presuppose a lack of independent sovereignty possess by the Aboriginal nation in question. If sovereignty over the territory or a form of territorial interest akin to sovereignty was recognised, the legal interest in the land would then turn on the Aboriginal legal tradition as to how Aboriginal people legally relate to land and form interests therein or, more accurately responsibilities thereto. The land interests familiar to the English legal tradition would be irrelevant.

Chartrand goes on to argue that Indigenous peoples understand land and geography differently than the conventional Euro-Western conception. He writes, "in many cultures indigenous to Turtle Island, the land is not capable of 'ownership'...[their relationship with the land] is more akin to one where the people maintain a reciprocal responsibility to care for the land so that it will care for them."⁴⁷² As the Courts rely primarily on Euro-Western meanings of land as territory, and because these views confirm Aboriginal peoples' *lack* of sovereignty, "Aboriginal peoples are not entitled to articulate their legal relationship to land according to their own understanding."⁴⁷³ This suggests that a territorial conception of space – space as bounded, owned, and culturally divisible – is not only inconstant with how Aboriginal peoples' define and understand their relationship to one another, their land, and to the State,⁴⁷⁴ but also constrains their *right* to do so. The relationship between territory and sovereignty at it applies to Aboriginal peoples is a reversal of the way in which it applies to Europeans, in that the impermissibility to articulate their relationship to the land is precisely what they perceive as a violation of their sovereignty. For Aboriginal peoples it is not land and territory that determine Aboriginal independence (like in the European case), but the fact that they are a self-governing nation which confers to them a right to express their relationship to land in accordance with

⁴⁷² See FN 27 in *Ibid.*: p 99.

⁴⁷³ *Ibid.*

⁴⁷⁴ As Nadasdy explains, forcing Aboriginal peoples to "speak the language of property" has the effect of "undermin[ing] the very beliefs and practices that a land claim agreement is meant to preserve [their cultural identity]." See, Paul Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations," *American Anthropologist* 104, no. 1 (2002): p 247.

their own worldviews. For them, this imposes a reciprocal obligation on the government to allow them this form of expression as a valid power derived from their status as sovereign nations.

Drawing on a similar theme, Alfred and Corntassel argue that one of the most disconcerting aspects of the Indigenous-State relationship today is that:

Contemporary Settlers follow the mandate provided for them by their imperial forefathers' colonial legacy, not by attempting to eradicate the physical signs of Indigenous peoples as human *bodies*, but by trying to eradicate their existence as *peoples* through the erasure of the histories and geographies that provide the foundation for Indigenous cultural identities and sense of self.⁴⁷⁵

Aboriginal peoples' relationship to the land is not a propertied relationship in the same way that land and territory are conceptualised in the Euro-Western tradition. They perceive land in terms of communal ownership with joint rights of access. According to Colebrook:

Claims for the sacredness of land by indigenous peoples are not just examples or instances of the various ways in which "we" (humanity) grant space significance. For the key difference is that space here is not "significant"--not seen as a marker, symbol, or image of cultural memory. Whereas western understandings of monument use space to mark an event, and do so in order to call future humanity to recognize and retain its past, sacred land is *both* infinite--demanding recognition from others--and inherently affective.⁴⁷⁶

In stark contradiction to the European doctrine of discovery, according to some indigenous traditions a section of land is perceived as being communally owned by a group even if its members are living a distance away.⁴⁷⁷ Aboriginal peoples' attachment to the natural environment is shaped not by enclosures, boundaries, and private access, but by "principles of reciprocity, nonexploitation, and peaceful coexistence."⁴⁷⁸ Nonetheless, similar to the way in which the organisation of land through property relations informs European cultural identity and is protected through the legal and political institutions of the State, Aboriginal peoples' self- and group-identity has also been forged through land and its relationship to their modes of life – including traditional activities like hunting, gathering, and trapping. Similarly, the customs

⁴⁷⁵ Taiaiake Alfred and Jeff Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism," *Government and Opposition* 40, no. 4 (2005): p 598.

⁴⁷⁶ Claire Colebrook, "The Sense of Space: On the Specificity of Affect in Deleuze and Guattari," *Postmodern Culture* 15, no. 1 (2004). <http://muse.jhu.edu/journals/pmc/v015/15.1colebrook.html> (Accessed 25 Sept 2014)

⁴⁷⁷ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto, 2012), p 61.

⁴⁷⁸ Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), p 12.

through which Aboriginal peoples' relate to and organise their environment have also had (and continue to have) significance for the development of their own legal and political structures.⁴⁷⁹

The idea that Aboriginal peoples' have always possessed forms legal and political organisation is, in some ways, contentious. For one it challenges Canadian legal literature that claims that Canada is "a settled territory, meaning that it is considered legally vacant at its foundation."⁴⁸⁰ Burrows explains how land and its resources are involved in the political and social structuring of a number of Aboriginal societies. Essentially, pre-contact Canada was understood as lawless or legally primitive, which diminishes (at best) or denies (at worst) Aboriginal contributions to the development of Canadian legal culture.⁴⁸¹ For many Aboriginal authors the Courts' unquestioned acceptance of the State's supremacy has been further compounded by a continued failure to acknowledge Canada as an artefact of the intersection between Aboriginal and Canadian histories. This oversight has, according to authors such as Youngblood Henderson and Borrows, long-sustained the view that Canadian legal culture and institutions can solely be sourced to European history, principles, and doctrines, and that Aboriginal peoples only figure on occasion, as the helpless subjects of this system. It is for this reason that I later argue, in Chapter Five, that liberal societies develop a new model of legal recognition that acknowledges this level of interpenetration between normative communities. Not only would this form of recognition give greater voice to Aboriginal contributions to liberal law, but it would more accurately depict the social and political realities of liberal multicultural societies.

B. Treaty-Making between Sovereign Nations

Chartrand's introduction in *The Story in Aboriginal Law* succinctly explains that Aboriginal rights claims are grounded in the question of how "Aboriginal peoples [can] regain[...] our dignity."⁴⁸² One of the ways in which he says that Aboriginal peoples have been successful in doing so is by seeking justice through legal recognition and compensation for the historical wrongs perpetrated against their communities by those to whom they ceded land in confidence.⁴⁸³ The literature that traces the state of Aboriginal-Canadian relations appears to suggest that Aboriginal peoples' dissatisfaction with the Canadian government cannot be entirely reduced to the issue of Aboriginal proprietary rights in land. Much of their resentment

⁴⁷⁹ Saskia Vermeulen, "The Nagoya Protocol and Customary Law: The Paradox of Narratives in Law," *Law, Environment and Development Journal (LEAD)* 9, no. 2 (2013).<http://www.lead-journal.org/content/13185.pdf> (25 Sept 2014). See, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto, 2012), p 59-104.

⁴⁸⁰ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto, 2012), p 13.

⁴⁸¹ But this has not always been the case. As Youngblood Henderson notes, the first colonial settlers that arrived saw indigenous political and legal institutions as *ideal*, and expressing genuine autonomy. See, James (Sakej) Youngblood Henderson, "First Nations Legal Inheritance in Canada: The Mikmaq Model," *Manitoba Law Journal* 23(1995): p 5-6.

⁴⁸² Larry Chartrand, "The Story in Aboriginal Law and Aboriginal Law in the Story: A Metis Professor's Journey," *Supreme Court Law Review* 50(2010): p 89.

⁴⁸³ *Ibid.*: p 92.

may stem from the Crown's failure to uphold the promises that were made to the Aboriginal peoples at Canada's inception. These contractual obligations were incorporated in a number of treaties based on negotiations that took place between the British Crown and Aboriginal peoples as the two *founding nations* of Canada. For many Aboriginal people these treaties represent one of the only genuine (European) attestations of the sovereign status of Aboriginal nations, though they are often not perceived as such by dominant State-centred legal discourse.⁴⁸⁴

During the early periods of colonialism in North America, the British, in the form of the Hudson's Bay Company forged a number of different types of agreements with the pre-existing Aboriginal communities. Miller refers to one set of agreements as 'compact treaties', which were designed to allow Europeans access to and use of Aboriginal peoples' land.⁴⁸⁵ These treaties were pursued to facilitate an exclusive right of trade between European settlers and the indigenous groups they encountered in, what was then referred to as, Rupert's Land. Miller claims that, while the Company's Charter named Europeans as the true proprietors of this land, the fact that Company men were instructed to continue to draft agreements with the indigenous groups for peaceful relations suggests differently. He argues that the continuance of this practice exemplifies that "the true proprietors of...Rupert's Land were the First Nations who occupied the territory."⁴⁸⁶ The Charter, therefore, symbolised merely "an exclusive right to negotiate" with indigenous peoples for a right of access to their land. According to this view, the resulting treaties, therefore, were nothing more than 'commercial contracts' with the local heads of First Nations groups.

Later agreements established between European settlers and First Nations' groups represented 'alliance treaties'.⁴⁸⁷ For the Iroquois and Mohawk leaders who were party to alliance treaties, these agreements served the dual function of maintaining European-Aboriginal trade affiliations, while also "perform[ing] diplomatic rituals of establishing and maintaining relationships with First Nations via fictive associations."⁴⁸⁸ Newly arriving settlers had to adjust themselves into the relationships and rivalries that were inherited by European merchants and

⁴⁸⁴ Isabelle Schulte-Tenckhoff, "Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties," *Review of Constitutional Studies* 4, no. 2 (1989).

⁴⁸⁵ James Rodger Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), p 4.

⁴⁸⁶ *Ibid.*, p 14.

⁴⁸⁷ Isabelle Schulte-Tenckhoff, "Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties," *Review of Constitutional Studies* 4, no. 2 (1989): p 247-8.

⁴⁸⁸ James Rodger Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), p 33-4.

traders through the political arrangements that were negotiated through alliance treaties. As Miller indicates this was not always a peaceful and non-violent process.⁴⁸⁹

During the latter half of the seventeenth century the administration of colonies in North America was transferred from commercial trading companies to the Crown. In many areas, the Crown sought to maintain amicable relations with the First Nations by signing peace agreements, though this was by no means an easy task given the rising hostility between the French and English (and thus the First Nations' groups allied with each).⁴⁹⁰ For Miller, these alliances between the British, French, and Aboriginal peoples' symbolised a mutual recognition of each group's sovereignty and autonomy.⁴⁹¹ These relationships were produced through an awareness that favourable economic and political transactions depended on maintaining harmonised interaction between all parties.

As Miller explains through his narrative of the Huron Feast of the Dead and the First Nations' wampum ceremonies, Aboriginal-European relations were marked by high levels of cultural exchange. It was not simply the Europeans that transmitted their political systems and forms of organisation into North America. There were many pre-contact First Nations' ceremonies and rituals that were integral to conducting diplomacy.⁴⁹²

By the time European-Aboriginal relations were being organised through territorial treaties, the formulation of reciprocal commercial and political relations through the process of treaty-making was a significant element of how these two communities were able to live in relatively stable arrangements and relationships with one another. In 1725, as part of the process of maintaining peace and friendship, the British signed the *Mascarene's Treaty* with the Mi'kmaq, Penobscot, and Maliseet groups. According to the treaty, the English promised:

the said Tribes all marks of Favour protection and Friendship and further engage and promise in behalf of the Said Government That the Indians shall not be molested in their persons, Hunting, Fishing and Planting Grounds nor in any other their lawful occasions by His Majesty's Subjects or their Dependants.

In return, the First Nations party to the treaty declared that "the Indians shall not molest any of His Majesty's Subjects or their Dependants in their settlements already made, or lawfully to be

⁴⁸⁹ Ibid., p 34-5.

⁴⁹⁰ Ibid., p 48.

⁴⁹¹ Isabelle Schulte-Tenckhoff, "Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties," *Review of Constitutional Studies* 4, no. 2 (1989): p 245-6.

⁴⁹² James Rodger Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), p 38-40.

made or in their carrying on their trade & other affairs within the said Province.”⁴⁹³ The regulation of Aboriginal-European relations through territory became more pronounced with the *Royal Proclamation* of 1763, which delineated the rules by which Aboriginal land could be legally acquired.

Like the Mascarene’s Treaty the Royal Proclamation’s section on Indian peoples also began with a promise to:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

... And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

From these early treaties we see a forging of reciprocal obligations; a policy of non-intervention in European commercial affairs and a right of peaceful settlement, in exchange for a right of non-intervention in the exercise of Aboriginal traditional practices on land not physically controlled by English subjects. It is also possible to identify British recognition of Aboriginal rights in land not expressly settled by the British.

There were other guarantees made through a number of subsequent treaties, some more direct, and other’s implied. For example, while not expressly provided for in the treaties, the promise of schools on these reserve lands and the promise of a medicine chest in one treaty has been interpreted by the Courts as illustrating a pledge made by the Crown for the provision of education and healthcare on reserve lands⁴⁹⁴ (a commitment that the government now denies given its absence from the express treaty provisions). Based on English customary law, and confirmed through political debates that took place during the early period of colonialism in

⁴⁹³ "Mascarene's Treaty," (Atlantic Policy Congress of First Nation Chiefs Secretariat, 1725).

<http://www.aboutourland.ca/resources/treaties/treaty-mascarenes-1725> (Accessed: 1 October 2014)

⁴⁹⁴ See Venne’s Reference to the ‘Medicine Chest Provisions’ and rights to education. See, Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: University of British Columbia Press, 2002), p 194.

North America,⁴⁹⁵ the presence of these treaties were a testament of the Crown's pre-colonial recognition of Aboriginal nationhood and sovereignty.

In examining the early commercial and alliance treaties to the later territorial agreements, it is apparent that the First Nations never understood land as capable of being possessed. Land became the basis of organising European-Aboriginal relationships through fictive kinship associations. This is not surprising, given the earlier discussion of Aboriginal understanding of land and the natural environment. While the treaty-making process represented British good faith towards Aboriginal people, there were many other ceremonies and rituals – the wampum, for example – which helped to sanctify European-Aboriginal alliances. The process of treaty-making was perhaps most crucial, however, because it evidenced European recognition of Aboriginal autonomy and sovereignty. The drawing up of agreements of peace, friendship, trade, and later territorial arrangements, signified an affirmation of Aboriginal peoples' political significance. In order to maintain peace and stability within the region, it was *necessary* that the two parties maintain amicable relations. The colonial relationship, therefore, was complex, in that in many ways it recognised the political (if not social) equality of Aboriginal and European people.

The significance of the treaty – as a marker of Aboriginal sovereignty - is not lost on the First Nations of Canada. Contemporary demands for recognition of Aboriginal sovereignty and cultural autonomy continue to be anchored in the process of treaty-making: the development of new treaties, the enforcement of old ones, and the review and modification of historically unratified ones.⁴⁹⁶ From studying the stance of Aboriginal legal literature and litigation in relation to Aboriginal rights it is the status of these contractual obligations between the Crown and Canada's Aboriginal peoples that are a source of frustration for these communities.⁴⁹⁷ As Chartrand notes, by the contemporary period, "the power balance between the two sides had shifted so much that in 1969 a Canadian prime minister could declare that the historical treaties that recognised the Indians' legal capacity to enter into treaty relations as distinct social and political peoples could be ignored."⁴⁹⁸ Perceiving this failure to uphold a nation-to-nation view of treaty-relations as an affront to their dignity as self-governing nations, the Aboriginal communities are pursuing litigation in the hopes that the Courts will force the State to meet

⁴⁹⁵ James (Sakej) Youngblood Henderson, "First Nations Legal Inheritance in Canada: The Mikmaq Model," *Manitoba Law Journal* 23(1995): p 7.

⁴⁹⁶ Rudolph R yser, *Indigenous Nations and Modern States* (Routledge: New York, 2012), p 60-1.

⁴⁹⁷ Sidney B. Linden, "Report of the Ipperwash Inquiry," ed. Government of Ontario (Toronto: Government of Ontario, 1995), vol.2, p 77.

⁴⁹⁸ Paul L.A.H Chartrand, "The 'Race' for Recognition: Toward a Policy of Recognition of Aboriginal Peoples in Canada," in *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand*, ed. Louis A. Knafla and Haijo Westra (Vancouver: University of British Columbia Press, 2010), p 125.

their obligations under these historic treaties. While post-Charter court decisions have, on a number of occasions, recognised the Aboriginal peoples inherent right to self-government,⁴⁹⁹ they have done so without questioning the doctrines underpinning Canadian sovereignty. These doctrines continue to shape Aboriginal-State relations in ways that diminish (or reject) the post-contact sovereignty of Aboriginal peoples. Instead, their political status is understood as being derived from a type of “merged sovereignty”,⁵⁰⁰ with the “accommodation of their rights” being defined as “not a zero-sum relationship between minority rights and citizenship.”⁵⁰¹

The claim that an incorporation of Aboriginal sovereignty within the “broader framework of Canadian sovereignty”⁵⁰² does not produce a zero-sum relationship between Aboriginal rights on the one hand and membership within the political community of Canada on the other, appears absurd when one considers the perceptions and sentiments of those that embody and work within these two traditions. In examining much of the Canadian legal literature penned by Aboriginal people the disquiet and unease with which they view the European common law system that they work within is clearly revealed. And it is most frequently exposed as fissures in their self-identity; of “liv[ing] with the implications of being part of the community that Aboriginal rights doctrine is intended to protect and yet only to find out that it does little if anything to protect me as an Aboriginal person. Instead it is offensive and harms me on a very deep and human level.”⁵⁰³ Their unease is further compounded by a growing factionalism amongst Aboriginal groups, and a distrust of traditional institutions which they view as having been transformed so as to reflect Euro-Western ideals and mainstream objectives.⁵⁰⁴ This has led some scholars, such as Monture-Angus, to come to the conclusion that Aboriginal peoples’ self-determination must begin ‘at home’, by “living as part of their community,” with the view that such communities be reformed so as to chiefly reflect Aboriginal principles and aspirations.⁵⁰⁵ For Monture-Angus this transformation begins not with legal *institutions* – which she views as “artificial creations” that have become part of the problem of Aboriginal peoples’ oppression – but with Aboriginal peoples themselves *living* Aboriginal law through their

⁴⁹⁹ “The Government of Canada’s Approach to Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government,” ed. Department of Indian Affairs and Northern Development (DIAND) (Ottawa: Department of Indian Affairs and Northern Development, 1995).

⁵⁰⁰ *R. V. Mitchell*, 1 S.C.R. 911, para. 9 (2001).

⁵⁰¹ See the opinion of CJ Major and Binnie in *Ibid.*, para. 16.

⁵⁰² *Ibid.*, para. 9.

⁵⁰³ Larry Chartrand, “The Story in Aboriginal Law and Aboriginal Law in the Story: A Metis Professor’s Journey,” *Supreme Court Law Review* 50(2010): p 113.

⁵⁰⁴ Taiaiake (Gerald) Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ontario: Oxford University Press, 1999), p 26-8.

⁵⁰⁵ Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence* (Winnipeg, MB: Fernwood Publishing, 1999), p 8.

interpersonal and collective relationships with one another.⁵⁰⁶ Self-determination for Monture-Angus, is dialogical; it is personal and relational. It is this relational and conversational aspect of self-determination that is entirely displaced by the many institutions that societies erect to confirm and verify Aboriginal sovereignty. Territory, is a progressive symbol of the institutionalised pursuit of validating and authenticating sovereignty. To the extent that it continues to shape Aboriginal peoples' quest for the recognition of their sovereignty, Aboriginal self-government becomes more "distant, professionalised, and removed from the people."⁵⁰⁷ What is remarkable about Monture-Angus' opinion is that the process of authenticating Aboriginal peoples' right of sovereignty is itself disempowering, because it presupposes that their right to self-rule is a legal right, in the sense that it must be a right that is verified and protected by the official law of the State. This practice therefore operates as a form of misrecognition because it fails to see sovereignty as an inherent right of Aboriginal peoples.

C. Misrepresenting Demands for Sovereignty as Demands for Property

According to the dominant political and legal literature, the transfer of Aboriginal land to the Crown was undertaken through processes of treaty-making. Aboriginal communities received monetary compensation and political and legal protection for relinquishing their title over land to the British Crown.⁵⁰⁸ While the dispossession of land was certainly one destructive consequence of these inequitable land-transfer schemes for Aboriginal peoples, the doctrine of discovery, which originally underwrote these transfers and later influenced case law in relation to claims for Aboriginal title and rights, had far greater deleterious effects for tribal sovereignty.⁵⁰⁹ Blumm argues that, while several landmark American cases reaffirm Indian proprietary rights by reference to the doctrine of discovery and European-Aboriginal treaty-making, they do so at the expense of further reinforcing "federal control over Indian affairs,"⁵¹⁰ and thereby produce a "substantial erosion of the tribes' sovereign authority."⁵¹¹

The legal system through which Aboriginal claims for autonomy and self-government are currently being filtered relies on a territorial vision of sovereignty. To make claims for self-determination Aboriginal people are required to translate their relationship to, and understanding of, their land to a form intelligible by the dominant legal discourse. The problem,

⁵⁰⁶ Ibid., p 158-9.

⁵⁰⁷ Ibid., p 159.

⁵⁰⁸ Felix S. Cohen, "Original Indian Title," *Minnesota Law Review* 32(1947): p 34-8.

⁵⁰⁹ Michael Blumm, "Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance for Treaty-Making and Modern Natural Resources Policy in Indian Country," *Vermont Law Review* 28(2004): p 715.

⁵¹⁰ Ibid.: p 717.

⁵¹¹ Ibid.: p 718.

of course, is that once this relationship is transcribed in the form of property relations⁵¹² – Aboriginal *ownership* of land – it ultimately fails given that it is held up to and judged *via* the doctrine of discovery and, by extension, an unquestioned acceptance of Canadian sovereignty. There is this perception that, surely two distinct communities cannot *jointly* own the same land. Through this process, what remains mostly invisible is that the Aboriginal peoples are *not only* making a claim for the return of their traditional lands, or the opportunity to exercise their customary practices on land that once belonged solely to them, but that the actual dispute is itself a struggle by Aboriginal peoples to shape the terms of negotiation. The process of litigation represents Aboriginal peoples’ demand for recognition of their sovereign right to control the language by which they articulate their relationship and obligation to land; a relationship that Section 5(A) of this Chapter clearly illustrated as being unlike the territorial vision of space espoused by Europeans.

Thus, the courts wrongly construe Aboriginal claims for sovereignty as demands for property rights over land. The problem with representing claims for self-determination as if they were claims for property is that, as soon as we categorise:

[n]on-European social relations as a set of ‘property relations’...we authorise politicians, judges, and other agents of the State to act on them as they would other more familiar forms of property. It gives them the conceptual tools and justification for imposing (yet again) their view of the world on Aboriginal people. To translate the ways in which Aboriginal people relate to one another and to the land into the language of property is, in essence, a tacit agreement to play by the rules of the game as set out by the State.⁵¹³

Moreover, in their misrepresentation of these claims the Courts are able to legitimise their *withholding* of an Aboriginal right to self-government. To illustrate, in *R. v. Mitchell* the Aboriginal peoples’ claim to special trade rights takes on a *territorial* character. Over the course of the judgement the Court claims that the Mohawk peoples’ claim of a right to cross-border trade is “strained *beyond reason*” because the evidence does not demonstrate, first, that pre-contact northernly trade existed, and even if the Courts were able to trace its existence it does not represent a defining feature of Mohawk culture or an essential aspect of the Mohawk peoples’ collective identity.⁵¹⁴ From this, the Court concludes that no Aboriginal right to transfer goods across the border for the purposes of trade can be recognised. What is interesting about the judgement is that, once again, an intense focus on a historical exercise of spatial borders and

⁵¹² Nadasdy asserts that, according to the Canadian courts, the legal doctrine of ‘Aboriginal title’ “is a form of property – real if somewhat mysterious in nature.” Paul Nadasdy, “‘Property’ and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations,” *American Anthropologist* 104, no. 1 (2002): p 248.

⁵¹³ *Ibid.*: p 251.

⁵¹⁴ Instead, they claim that Mohawk pre-contact trade across the St. Lawrence River “fell along an east-west axis.” See, opinion of CJ Major and Binnie in *R. V. Mitchell*, 1 S.C.R. 911, para. 4 (2001).

boundaries naturalises the withholding of Aboriginal rights to self-government. *Mitchell* was not simply a case about the appropriateness of trade duties on Aboriginal transportation of products across borders, it brought to the forefront the issue of the Aboriginal peoples' sovereignty; their capacity to make decisions about their livelihood and internal affairs free from State intervention. By grounding this dispute in an analysis of territorial borders and pre-contact trade routes, the Court sidesteps all discussion about the moral right of Aboriginal peoples to act as self-governing nations.⁵¹⁵

What is further significant about *Mitchell* is that the Court explicitly makes mention of the issue of Aboriginal sovereignty, presenting it as if it were antithetical to Canadian territorial integrity. The 'territorial spin' given to this particular dispute has the effect of treating Aboriginal quests for greater autonomy as unconscionable. The Court declares:

Counsel for the respondent does not dispute Canadian sovereignty. He seeks Mohawk autonomy within the broader framework of Canadian sovereignty. The respondent's claim is not just about physical movement of people or goods in and about Akwesasne. It is about the Mohawks' aspiration to live as if the international boundary did not exist.⁵¹⁶

The Court's statement appears to suggest that the exercise of sovereignty by Aboriginal peoples invariably challenges the territorial boundaries of the State, and thus the basis for the State's own claims of independence. For Alfred, the implication of the *Mitchell* decision was that Aboriginal peoples were believed to have no rights outside those granted by the Government of Canada. His reading of *Mitchell* expresses frustration at the Court's failure to accept Mohawk sovereignty, and he admonishes First Nations groups for buying "into the false promise of steady progress toward a just accommodation of our existence as peoples with that of the Canadian State."⁵¹⁷

The conflation of the spatial relationships of property and sovereignty is precisely what makes Aboriginal title and rights claims such a complex and challenging issue. Often a reading of Aboriginal rights and title litigation from those external to the process leads to the perception that Aboriginal communities are seeking an enhancement of their property rights – the right to do with their land what they desire and the capacity to exploit, develop, and alienate historic

⁵¹⁵ The Court's decision in *Mitchell* suggests as much when it claims that since the claimant was unable to demonstrate an Aboriginal right, in this case, "there is no need to comment on the extent, if any, to colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s. 35(1) of the *Constitution Act, 1982*." See, *Ibid.*, para. 6.

⁵¹⁶ *Ibid.*, para. 9.

⁵¹⁷ Taiaiake Alfred, "Aboriginal Rights Are Meaningless," (2001).

<http://www.peace4turtleisland.org/pages/bordercrossingtaiaiake.htm> (1 October 2014)

lands to their benefit. It is the land, rather than the Aboriginal person, that is perceived as the key feature of this struggle. However, a closer reading of much of the Aboriginal legal literature that comments on and analyses Canadian-Aboriginal relations and Aboriginal rights and title case law, reveals that political and legal sovereignty is a more pressing issue for Aboriginal communities in Canada. While economic self-sufficiency and autonomy are important features and rights of sovereignty, a disproportional focus on Aboriginal proprietary rights, over Aboriginal sovereignty, obscures the core of contemporary Aboriginal rights claims. While the legal and political systems organised in accordance with European intellectual and philosophical traditions may perceive territory and sovereignty as aspects of one another (i.e. there is no such thing as non-territorial exercises of sovereignty), this is not how Aboriginal peoples have traditionally understood the terms and exercise of their independence.⁵¹⁸ These issues have themselves been revealed through a spattering of legal cases grounded in the presupposition that an Aboriginal right to engage in traditional practices *on* land cannot exist independently from a title *to* land.⁵¹⁹ Moreover, the Supreme Court in *Adams* has clearly indicated that the Common Law can accept that proprietary rights in land are not necessary to the exercise of cultural autonomy.⁵²⁰ What is encouraging about this reality – that a society's connection to land may be something entirely different than proprietary – is that it presents us with a greater opportunity for finding a workable solution that upholds the significance of territorial integrity to European conceptions of sovereignty, as well as the reciprocal obligations that Aboriginal people have with their land (to protect and preserve it), an obligation that is absolutely essential to the exercise of native sovereignty.

7. Concluding Remarks: Law's Reproduction of Space as Territory

In this chapter I demonstrated how the effects of the earlier techniques of Imperial witnessing could be identified within the forms of diversity management that emerge in both the colonial and postcolonial setting. This analysis paints a more complex picture of Occidental Legality, suggesting that many of the subjective representations of the Imperial-Indigenous encounters have been institutionalised and authenticated through colonial and postcolonial forms of law and governance. In this chapter I examined British political and legal structures in colonial India, and the structures of governance in present-day Australia and Canada.

⁵¹⁸ See my earlier discussion in Section (A).

⁵¹⁹ Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?," *Alberta Law Review* 36, no. 1 (1997): p 119.

⁵²⁰ *R V. Adams*, 13 C.N.L.R, para. 26-7 (1996).

In the Indian context we see the preoccupation with space and 'spacing difference' carrying forward to the promulgation of the 'public/private' divide which helped to naturalise religious difference by giving the impression that personal and public laws operate in two non-intersecting spatial (and temporal) dimensions. In linking law to geography, British colonial agents were able to conceal and naturalise the unequal application of the law to Indians and were able to create racialised enclaves against which they were able to better distinguish European identity and cultural superiority. Space was employed as a way of categorising colonial relations, and its regulation was frequently used as a way of exercising European political and cultural power.

Australia and Canada present themselves as liberal and progressive societies, and cannot at first sight be characterised as categorically oppressive regimes. In many ways political and legal developments in both countries have demonstrated a genuine interest in accommodating Aboriginal peoples and developing a more inclusive framework of Aboriginal cultural rights. For all intents and purposes Australia and Canada no longer represent the political and social visions once attributed to the settler-colony. Yet, even within the very attempts at protecting Aboriginal culture and preserving Aboriginal rights, we can identify a colonial preoccupation with space and distance as crucial representations and elements of cultural difference.

The model of territorial space that emerges through these contemporary legal and political narratives in Australia and Canada is reminiscent of the design of space that coalesced through the early technologies of Imperial witnessing during the fifteenth to twentieth century. Territorial space is a material portrayal of cultural difference, the borders of which trigger anxieties of proximity, and quests for distance-making. Determinations of cultural difference are underwritten by spatial metaphors that imagine cultural diversity as incommensurable and present the Indigenous Other as having different visions of social and political life.

The main preoccupation of Occidental Legality, through the implementation of divisions, domains, spheres, limits, lines, and boundaries, has always centred on preventing the movement of the native body and impeding cultural hybridity. The "legal enterprise is fundamentally about drawing lines, between the acceptable and unacceptable, between the normative and deviant."⁵²¹ For all the inclusive policies and democratic and liberal rhetoric, as well as claims of a shared identity and vision of the future, the modern State is still characterised by an intense fear of black and white bodies touching one another. The racialisation of space, the division of normative orders along imagined boundaries of sameness and difference, the definition and

⁵²¹ Mark Kessler, "Free Speech Doctrine in American Political Culture: A Critical Legal Geography of Cultural Politics," *Connecticut Public Interest Law Journal* 6, no. 2 (2007): p 210.

containment of cultural difference through constructed temporal categories of modernity/traditionalism, order/chaos, signals a modern preoccupation with maintaining space and distance between those deemed culturally different and often, inferior.

In the last section of this Chapter I bring the work of Occidental legality and its construction of territory back to the issue of Aboriginal self-government, and specifically how territorial conceptions of geographic space structure Aboriginal-State relations in Canada. Here, I draw on the perspectives of Aboriginal peoples to demonstrate how their struggle against the Canadian State, though often misrepresented as being territorial (in the sense of 'propertied'), is actually grounded in their desire to be recognised as equal and self-governing nations. The sovereignty of Aboriginal people is undermined by Canada's refusal to allow Aboriginal peoples to articulate their relationship to the land and its resources in ways that are consonant with their own self-understanding and worldview, and further by a failure to uphold its treaty obligations to the First Nations people.

Consequently, it is not simply the recognition of Aboriginal prior-occupation and title in land that is pressing and substantial for the Aboriginal peoples of Canada, it is the continued recognition and respect of their sovereignty as equal, self-governing nations. The fact that these treaties are rooted in the ceding of land that ultimately established the State's monopoly on political and legal power and legitimacy is what makes space and geography so intimately related to the question of Aboriginal sovereignty and self-government. Since Aboriginal people believe in a reverse relationship between land and sovereignty in comparison to the dominant Euro-Western conception (i.e. political and legal independence accords a nation the right to determine their relationship to the land), their ceding of land most certainly should not be thought of as a simultaneous relinquishment of their sovereignty.

The overreliance on territory as a precondition for autonomy and as a mechanism for the exercise of power obscures the issue that is really at the heart of Aboriginals' claims for autonomy and recognition, which is the demand that the State recognise the coevalness of Aboriginal presence, traditions, identity, and history. This is a coevalness that rightly distinguishes Aboriginal peoples as nations who are as equally sovereign as the Canadian State. Jurisdictional conflicts are not about the acquisition of space, they are about determining the limits of authority within a *shared space*. As Read explains "every room in that house [the State] is not *occupied* but shared...but the decision about who shares which room is made by the

authority of the non-Indigenous alone.”⁵²² Thus, the intense focus on territoriality displaces the issue of how social communities can develop ways in which to live in harmony with one another, *sharing* space and recognising each other’s reciprocal right and connection to that space. Constructions of space as ‘place’ and the production of imagined geographies like the Reservation, the national park, and the public/private divide, are therefore distortions of reality that conceal plurality. Imagined geographies modelled on an owned, enclosed, and culturally-divisible space, give the impression of unity, stasis and immutability in the face of a disordered simultaneity of social interactions and processes. Consequently, when contemporary societies rely on these imagined geographies, they completely evade the issues most central to claims for jurisdiction and cultural autonomy.

In analysing the effects of Occidental Legality on the ways in which contemporary societies manage issues of legal and cultural pluralism, it appears that minority communities are often produced and represented through a discourse which has traditionally been implicated in forms of racial and cultural marginalisation and oppression. In studying how this has played out in Canada and Australia, I reveal how liberal law is neither neutral nor universal. In response to this claim, it would seem that the obvious solution would be to allow Indigenous and minority communities the ability to define their own sense of self and to use that definition for the exercise of self-government. While both Canada and Australia have gone to some length in promoting rights to self-government, a right that many multiculturalists have declared necessary in terms of liberalism’s respect for autonomy,⁵²³ the territorial models of self-government that have been pursued (i.e. claims for Aboriginal title and the Reservation system) have been shown to be problematic because they continue to promulgate and reproduce a racialised construction of space and, in turn, a very strict and reified conception of Aboriginality. Demands for recognition are construed as demands for ‘space’ to practice the traditions of one’s ‘culture’ (which is constructed as ossified, static and essentialised). Moreover, a further problem with this approach is that it marginalises appeals for property, for ownership over space that safeguards autonomy by confirming the (genuine rather than imposed) humanity of Aborigines.

In many ways this chapter is a strongly critical reading of the contemporary State system and its liberal courts. A focus on this critical perspective reveals that there are, indeed, many problems with the ways in which the rights of Indigenous groups are defined and determined in the Canadian and Australian context. Yet, at the same time, my analysis over the course this chapter

⁵²² Peter Read, *Belonging: Australians, Place, and Aboriginal Ownership* (Cambridge: Cambridge University Press, 2000), p 2.

⁵²³ W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, USA, 1996). Also see, Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (New Jersey: Princeton University Press, 1994).

also demonstrated that there may be some truth to the liberal commitment to providing autonomy for the Other that has previously been colonised or dispossessed. One of liberal law's most celebratory aspects is that the Other is given space for opposition. Certainly the discussed liberal techniques for managing difference (i.e. Aboriginal title and the Reservation system) may not represent an ideal opportunity for opposition, given that in these instances liberal law appears to be unfairly encroaching on the cultural practices of minority communities. However, it is an opportunity for negotiation and mutual-understanding that could not be possible in situations where native and liberal law were allowed to govern separate and non-overlapping spatial domains.

In the next chapter I discuss one jurisdiction where Occidental Legality has had detrimental effects on a minority community, but where there is no liberal management of the consequences of marginality and the exclusion of racial Others. In focusing on the case study of the tribal areas of Pakistan, I examine how its Pakhtun residents have been marginalised through the colonial discourse of Occidental Legality, which continues to operate despite the withdrawal of colonial forces and the end of direct British colonial rule. Despite the end of colonial governance and over fifty years of independence, the Tribal Areas remain on the periphery of economic development, and political and cultural life. I examine this continuing problem of exclusion, and focus on the unexpected ways in which the political and legal structures of governance in Pakistan have entirely foreclosed the possibility of Pakhtun opposition. It is interesting, however, that the ways in which they have done so seems consonant with the aims of liberal multiculturalism and its attendant notions of legal pluralism.

Chapter Four

The Operation of Occidental Legality in the Tribal Areas of Pakistan

Reimagining the Orient

1. Introduction

In this chapter I analyse the political and legal governance of the Tribal⁵²⁴ Areas of Pakistan to reveal how Occidental Legality continues to shape State-tribal relations in accordance with a model of space that emerged during Britain's colonisation of India. In my analysis I use an integrative approach that draws on the methodologies used in Chapters Two and Three. There are several novel aspects of this particular case study which, I argue, collectively produce an interesting system of governance with which to compare the Canadian and Australian model of Aboriginal rights. These features inform four broad ideas that I defend through this chapter. While I consider these arguments very briefly in the next few paragraphs, they suggest themes that will emerge within the following sections of the chapter and which I will return to throughout the course of this discussion.

First, there is the issue of colonial governance in India. Unlike Canada and Australia, India was not a settler-colony. While the territories of the two former States were settled by European emigrants looking to build a new life outside of the European continent, the European presence in India, as I mentioned earlier in Chapter Three, was initially for the purposes of trade and commerce. After the Indian Partition in 1947, the British withdrew, leaving behind a bisected subcontinent, arranged into two religiously-defined States: Muslim-majority Pakistan and Hindu-majority India. As a non-settler colony, contemporary Pakistan's anxieties over cultural heterogeneity do not serve the specific purpose of legitimising the colonising power to a newly decolonised, population. In revealing the continued relevance of spatial techniques to State-Tribal relations in Pakistan, I dismiss the claim that Occidental Legality was a system of

⁵²⁴ I want to preface this chapter with one important claim. The idea of 'tribal' generally has many negative connotations to it, which suggest that it is a descriptor that is frequently used to denote pre-modern, static, traditional, and underdeveloped social groups. These are implications that have been attached to the term by the discursive practices of theorists and empiricists trained within the Western tradition. Recently, a growing awareness of its derogatory usage has made the term obsolete in Western academic discourse. However, I continue to use the term because in this chapter for two reasons. 'Tribe' is a term that is still used within the Indian subcontinent by groups who self-define as tribal. Its usage does not have negative undertones in these instances, and it is a label often invoked as a "marker of nobility. Belonging to a tribe means to be of distinguished and old ancestry, to belonging to genuine people, to be dependable. As a *tribal* one is bound by a network of primordial obligations on the solid basis of well structured genealogical ties." See, Bernt Glatzer, "The Pashtun Tribal System," in *Concept of Tribal Society (Contemporary Society: Tribal Studies, Vol. 5)*, ed. G. Pfeffer and D.K. Behera (New Delhi: Concept Publishers, 2002), p 265. In addition, the 'Tribal Areas' is also a legal category, attached to the area by colonial and later Pakistani law. In this last sense, as I identify through this chapter, 'tribal' brings with a whole range of non-positive features, attributes, and imaginings about the Pakhtun people of Pakistan.

ordering developed by the colonisers and imposed on the colonised. Instead, I submit that Occidental Legality is a framework of 'hegemonic knowledge' that continues to persist irrespective of European physical presence.

The second idea that informs this chapter is that, because India was not a settler-colony, the prominence of Occidental Legality within Pakistan points to a further 'dislocation of culture'. Pakistan is an interesting example of *the Orient* imagining and constructing its own *Orient* or, perhaps more alarmingly, *the Orient* erecting itself as a new Occident of the once-colonised world. I say alarmingly precisely because Pakistan disrupts the conventional categories through which we structure our understandings the colonial experience. As I will discuss later in this chapter, this last (of Pakistan as a new Occident) claim seems all the more likely given that Pakistani law and politics mimics a British model, and frequently invokes Anglo-European legal philosophies and doctrines to resolve questions of legal jurisdiction. Two questions that will inform this analysis are: how does this clarify (or allow a critique of) the notion of Occidental Legality? How does a space that transgresses the identities and ideologies mapped onto it reshape our understanding of social and political ordering?

Third, unlike Canada and Australia, the situation in Pakistan has failed to generate a conversation between the State and the Pakhtun people to the same extent as it has in the former two jurisdictions. This, I suggest, is largely because the Tribal Areas were constructed as a 'liminal space'; a space 'neither here nor there' – both geographically and legally. Its liminality arose from the fact that the areas were initially imagined *not* with the intent of protecting the ethnic minorities housed within it, but as a 'distance-creating' project meant to protect British possessions in India from Russian encroachment through Central Asia. While it may be claimed that the legally anomalous status of the Tribal Areas are a relic of the colonial occupation that the State must endure so as to maintain national cohesion, there is also the counter-claim that national unity is weakened by State-law's unwillingness to extend a similar set of citizenship rights to its tribal community as it does other members of its polity. In this chapter I discuss what this means, not only for the Pakhtun people of the Tribal Areas, but also what this suggests about the relationship between territory and political community more broadly.

Fourth, the situation in Pakistan, by which I mean the way in which normative autonomy is legally accorded to the Pakhtun tribes living within the Tribal Areas, appears congruous with the stated aims of liberal multiculturalism and its attendant notions of legal pluralism. The State has, in effect, given the Pakhtuns of the Tribal Areas wide-ranging freedoms of self-government by preventing the extension of the State's legal jurisdiction into these regions. While, on the surface, this may appear consistent with the prevailing theories of minority protection and legal

pluralism, this chapter demonstrates how this construction of autonomy operates to undermine these liberties in practice.

This case study provides interesting insight into the social construction of cultural space, and the role that the natural environment plays in the determination of Other-identities. The construction of the Tribal Areas, as a cultural geography, occurs through processes of dehumanisation and difference-making which render the Pakhtun⁵²⁵ people outside the boundaries of citizenship and its associated legal protections. The processes through which space, by which I mean both the natural and constructed environment, is experienced, imagined, and used to order relations, plays a significant role in how Pakhtun identity is envisaged and composed, and has a crucial part to play in the community's continued economic, political, and social marginalisation. Over the course of the chapter I analyse how the colonial expansion produced the tribal areas of Pakistan through a European desire to maintain distance between its interests in India and its Russian enemies advancing into Central Asia. As such, while the area is understood as the historic homeland of the Pakhtun community, its 'tribal'⁵²⁶ character was introduced through the European social imaginary and incorporated into colonial (and later postcolonial) political and legal structures and institutions.

The second important insight that is revealed through this case study is that, while Chapter Three has evidenced many of liberal law's deficiencies, the cultural spaces of the Tribal Areas hardly represent a viable alternative. While these areas are regularly conceived as *lacking liberal law*, and being entirely shaped by native custom and practice, they certainly do not produce the robust structures of protection that liberal multicultural societies expect. Gender discrimination, lack of economic self-sufficiency, high levels of illiteracy, limited access to State institutions – these all characterise everyday life in the Tribal Areas of Pakistan. And so, while Pakistan represents a particularly stark example of territorial cultural autonomy gone awry, it presents us with an opportunity to examine why we should be seeking intermarriage between liberal and native law, rather than a compartmentalisation of the two.

The following sections of the chapter are organised so as to trace a historical continuity between the aforementioned themes. In so doing I suggest that colonial conceptions of space and the practices that they gave rise to, are connected to contemporary geographic imaginaries and the strategies which have been constructed by modern political society to hold these

⁵²⁵ In many of these historical narratives the Pakhtuns are referred to as Pathans or Pashtuns (the latter being an Indianised variant of the community's name). However, I have chosen to employ the term 'Pakhtun' as that is how they self-identify.

⁵²⁶ And all the negative connotations that Western discourse attaches to the term 'tribal', including societies that are traditional, static, unyielding, and primitive.

geographies in place. This means that, frequently, I draw on examples from the colonial and Partition periods to further bolster or explain a contemporary phenomenon or practice. This approach has been utilised to demonstrate the continued prominence of Occidental Legality and to disrupt the suggestion that the self-imposed limitation on the State's legal jurisdiction is a form of protecting tribal diversity.

2. The Space-Identity Matrix of Power

Through Chapters Two and Three I have explored the ways in which the linking of geography and identity has been an essential accompaniment to the exercise of colonial power. In many ways the spatialisation of native identity has encouraged forms of social, material, and ideological containment. They represent ways in which the colonial powers have attempted to distance themselves from native communities for the purposes of maintaining their cultural integrity and superiority.

In this Chapter I argue that the colonisation of India fit a similar pattern, and the relationship between geography, identity, and political power readily informed colonial-Pakhtun relations. The act of formulating a violent and unruly identity for the Pakhtuns was naturalised by referring to the precarious and turbulent landscape which they occupied. Not only did this misrepresent the act of identity-construction as a benign exercise, a mere *observation*, but it stripped Pakhtun people of their agency, suggesting that their retaliatory actions were not political in nature – they were not to be perceived as a rational response to conquest – but rather as an expression of their lawless character and irrational nature.

What is further remarkable about this relationship is that it was the need to *neutralise* geography – extract from it all its normative content and reproduce it as a *jurisdictionless* space between Britain and Communist-Russia – that necessitated the representation of the Pakhtun people inhabiting this area in inhumane and irrational terms. Over the course of this discussion, I demonstrate how this characterisation of the Pakhtun people provided the necessary impetus for colonial law to extend its reach into this space of 'legal exception'. Accordingly, the Tribal Areas were *never*, not even during the course of the *Great Game*, *jurisdictionless*, or politically and legally neutral. In fact, as I illustrate, this cultural geography was saturated by legal pluralism, a space of 'legal exception' that was, in truth, a place of 'legal excess'.

European interest in India had always been one of a commercial nature⁵²⁷ rather than about the subjugation and possession of native peoples.⁵²⁸ European economic enterprise in India first came in the form of the British East India Company (BEIC) in the early parts of the eighteenth century. The Company was given the right to exclusive trade in India, and to make laws for the political and commercial administration of the area. Official Company rule began in 1757, after the Battle of Plassey, but lasted for only a year before the commercial venture was extended to include formal legal and political administration by the British Crown.

There are two reasons for this broadening of the British mandate to include legal and political control. Firstly, the government was fielding many complaints about the treatment of natives by Company officials and the inability of Company courts to resolve disputes amongst its agents.⁵²⁹ These complaints were taken more seriously after they culminated in the Indian Rebellion in 1857.⁵³⁰ More importantly, however, British political and military interest in India was piqued by the Russian expansion into Central Asia, a move that the British interpreted as potentially threatening their financial interests within the subcontinent.⁵³¹ Collectively, these two events brought about Crown administration and signalled the beginning of the British *Raj*. In 1858 all annexed territory was declared a Crown Colony and the governance of India rested on the British Parliament, with full responsibility of Indian Affairs being allocated to the Secretary of State for India and the Viceroy (Governor-General), who acted as the central administrative officer within the colony itself.⁵³²

3. Imagining the Buffer and Spatialising the 'Frontier'

One of the methods devised by the British to manage the impending Russian threat was to develop a buffer zone to create distance between India and Russia, and which would act as a politically-neutral barrier to Russian advancement through Afghanistan. While the idea of a buffer zone permeated Anglo-Afghan relations for much of the second half of the nineteenth and

⁵²⁷ Columbus, for example, tried to seek out India to exploit its spices and gold. See, Nicolas Wey Gomez, *The Tropics of Empire: Why Columbus Sailed South to the Indies* (Cambridge, MA: MIT Press, 2008).

⁵²⁸ This, some have suggested, has always been the aim of British colonialism; in the sense that it has always been about commodities and the exploitation of natural resources rather than large-scale conquest and "subjugating and converting natives." See, Ken MacMillan, *Sovereignty and Possession in the English World: The Legal Foundation of Empire, 1576-1640* (Cambridge: CUP, 2006), p 121.

⁵²⁹ Bernard S. Cohn, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989), p 134.

⁵³⁰ Also referred to as the 'Sepoy Mutiny'. For a more detailed history about the Rebellion see, Christopher Hibbert, *The Great Mutiny: India, 1857* (Allen Lane London, 1978).

⁵³¹ Giving rise to over a century of Anglo-Russian rivalry for control over Central Asia. This era is often referred to in the literature as 'The Great Game'.

⁵³² Sandra Fullerton Joireman, "The Evolution of the Common Law: Legal Development in Kenya and India," *Commonwealth and Comparative Politics* 44, no. 2 (2006): p 197.

the early parts of the twentieth century, it wasn't until 1919 that this buffer was politically recognised in the form of an international boundary called the Durand Line (with the space on the Indian side of the border being referred to as the 'North-West Frontier').⁵³³ The fixing of the Anglo-Afghan spheres of influence through the drawing of the Durand Line in 1893 was considered to be one of the most significant political developments of this period, and one which would become a point of contention between Afghanistan and Pakistan over the next century.

The ways in which the space delineated by the Durand Line was imagined and managed appears reminiscent of the Treaty of Tordesillas, whereby European political and military interests diverted attention away from all discussion about what the implementation of a buffer zone would mean to the people living along the frontier.⁵³⁴ Consequently, the Durand Line has produced a most unusual arrangement, in that it runs directly through Afghan tribal lands and divides key Pakhtun clans (*Mohmands*, *Afridis*, and *Waziris*), placing them on separate sides of an international boundary.⁵³⁵ Moreover, the Indian side the Durand Line runs parallel to a politically neutral zone that was accorded political autonomy from before Crown rule. Because of its formal status as politically neutral, this area, as I discuss further in the next few sections of the chapter, is misconceived as being emptied of British power and presence.

A. Naturalising the Buffer

Instead of looking to the people being affected by the Durand Line, the British turned to the natural landscape of the area to determine where the borders of the international boundary would be set. Beginning at the western end of the Himalayas, the Frontier was imagined in two parts. Composed of a landscape that was arid and barren, encompassing peaks that thrust upwards to 10,000 feet in height, the western part of the frontier lay almost entirely in the mountains between the administered border of India and Kabul.⁵³⁶ The mountainous environment and dry climate of the hills made the area largely uncultivable and thus economically unprofitable for the British. In addition, the rough terrain was difficult to navigate

⁵³³ An Anglo-Afghan buffer zone was an idea that was first attempted by the BEIC, to their own detriment, in the 1840s. The British invasion of Afghanistan ended with the Anglo-Afghan War (1839-1842) with over four thousand British and Indian casualties. The idea of a buffer zone gained prominence again in the first quarter of the twentieth century, after the heightening of Anglo-Afghan tension, which led to the third Anglo-Afghan War (1919), and ended with the signing of an armistice that institutionalised an international boundary between India and Afghanistan in the form of the Durand Line. See,

⁵³⁴ This oversight has caused some to remark that the Durand Line represents "a line without strategic, geographic, or cultural basis." See, Dorothea Seelye Franck, "Pakhtunistan: Disputed Disposition of a Tribal Land," *Middle East Journal* 6, no. 1 (1952): p 52.

⁵³⁵ Bijan Omrani and Frank Ledwidge, "Rethinking the Durand Line: The Legality of the Afghan-Pakistani Frontier," *RUSI* 154, no. 5 (2009).

⁵³⁶ Olaf Caroe, *The Pathans, 550 Bc--Ad 1957* (London: Macmillan and Company Limited, 1958), p xvii.

and proved problematic in terms of subduing local uprisings. The turbulent and haggard terrain was, however, optimal for providing a natural defence against external aggression. The second zone of the frontier plains was imagined more favourably. Wedged in-between the ranges of the Hindu Kush and the Suleiman mountains, the valleys of the Indus were lush and fertile.⁵³⁷ Containing plentiful deposits of nutrient-rich loam, this second area was agriculturally profitable and able to produce in abundance when given the right amount of rainfall. It was along the frontier plains that British settlements were readily established and it was along the more challenging landscape that the Durand Line was located so as to use the mountainous terrain along the Khyber Pass⁵³⁸ as a natural barrier.

British presence was made increasingly visible within the valleys of the Indus through the implementation of European styles of law and governance, and by a strict patrolling of boundaries between the settled areas in the plains and the (unsettled) mountainous regions to the West.⁵³⁹ British political agents took great efforts to delineate these boundaries between the settled and unsettled areas and there was implementation of more structured spaces for the operation of politico-juridical and economic authority.⁵⁴⁰ Early Crown rule, as I had discussed in Chapter Three, adopted more fluid forms of legal administration, which often drew on Hindu and Muslim personal law alongside British common law.⁵⁴¹ Disputes were managed using a mix of formal courts and informal forms of localised adjudication including the customary *jirga* and *panchayats*.⁵⁴² As the buffer between Britain and its external enemy, the North-West frontier, however, was managed through stricter forms of colonial regulation that, as I will discuss later in this chapter, resulted in an Anglo-Pakhtun model of law based on a gross misconception of Pakhtun customary norms. The use of more stringent frameworks of military and political regulation was further bolstered by the fact that the hill tribes in the unsettled areas - now

⁵³⁷ Ibid., p xxii.

⁵³⁸ One of the most important commercial passages that links the Indian subcontinent to Asian markets.

⁵³⁹ "Despatch from the Secretary of State for India to His Excellency the Right Honourable Governor General of India in Council, Dated January 28 1898" in "East India (North-West Frontier): Papers Regarding British Relations with Neighbouring Tribes on the North-West Frontier of India," ed. His Majesty's Stationary Office (British Parliamentary Papers, 1901), p 11, 13.

⁵⁴⁰ Bernard S. Cohn, "From Indian Status to British Contract," *The Journal of Economic History* 21, no. 4 (1961): p 614-5. Also see, Eric Stokes, "The First Century of British Colonial Rule in India: Social Revolution or Social Stagnation?," *Past & Present* 58(1973).

⁵⁴¹ Legal processes followed the dynamic and comprehensive procedures inherited from the Mughals. See, Bernard S. Cohn, "From Indian Status to British Contract," *The Journal of Economic History* 21, no. 4 (1961): p 614-5.

⁵⁴² *Panchayats* and *Jirgas* were informal bodies assembled for the adjudication, discussion, and resolution of disputes that (usually) took on more of a restorative (rather than punitive) character. Usually composed of a group of elders, the disputants, and interested members of the community, these bodies typically resolved conflict through the use of customary norms. See, Ibid.: p 617. Also see, Hassan M. Yousufzai and Ali Gohar, *Towards Understanding Pukhtoon Jirga: An Indigenous Way of Peacebuilding and More...* (Peshawar, Pakistan: Just Peace International, 2005). Also see, James Spain, *The Pathan Borderlands* (The Hague: Mouton & Co., 1963), p 69-72.

existing along one of the most strategically perilous spaces⁵⁴³ but commercially valuable areas⁵⁴⁴ of the subcontinent - were a constant source of harassment for the settled areas.⁵⁴⁵

The tenuous nature of British rule in these regions was exacerbated by the fact that social life rarely complied with the colonial boundaries. The permeability of the border between the British-dominated and native-inhabited areas had the effect of blurring the transition from the 'tamed' to 'untamed' spaces (and people) of the Frontier. The British officers were cognisant of the fact that their continued authority relied on being able to stifle expressions of resistance mounted within the untamed areas.⁵⁴⁶ In the eyes of the political agents, this consistent shift between the 'tamed' and 'untamed' rendered the tribesman untrustworthy and the space that he occupied dangerous. The uncertainty brought about through intermixing, the possibility of hybridity, was a constant source of British unease. These anxieties were further reinforced by the fact that many of the tribesmen's tactics of resistance against colonial rule were strategies learned when fighting alongside the British during the three Anglo-Afghan wars.⁵⁴⁷ This suggested not only an unusual and unsettling 'hybrid' morphing of the Pakhtun, but in the eyes of the Europeans, confirmed Pakhtun deceitfulness.

While the Durand Line had the effect of allocating the North-West Frontier to India, colonial administrators never thought of these areas as part of their Empire within the subcontinent.⁵⁴⁸

⁵⁴³ See Stewart's reference to a report of the Simon Commission. "The North-West Frontier is not only the frontier of India...it is an international frontier of the first importance from the military point of view for the whole Empire." Jules Stewart, *The Savage Border: The History of the North-West Frontier* (Gloucestershire: Sutton Publishing, 2007), p 16-7.

⁵⁴⁴ Commercially valuable in the sense that the Khyber Pass, the major trade route between Central and South Asia runs along the Durand Line.

⁵⁴⁵ There are several examples of Imperial correspondence between political agents stationed in India and the metropole government that relay experiences of looting and banditry at the hands of the hill tribes. See, "Parliamentary Papers: East India (Progress and Condition): Statement of the Moral and Material Progress of India 1865-6," in *Printed for His Majesty's Stationary Office*, ed. House of Commons Parliamentary Papers Online (London: House of Commons, 1867), p 44. See, "Despatch from the Secretary of State for India to His Excellency the Right Honourable Governor General of India in Council, Dated January 28 1898" in "Parliamentary Papers: East India (North-West Frontier), Papers Regarding British Relations with Neighbouring Tribes on the North-West Frontier of India and Punjab Frontier Administration [Cd. 496]," in *Printed for His Majesty's Stationary Office*, ed. House of Commons Parliamentary Papers Online (London 1901), p 7-9.

⁵⁴⁶ In letter by W.H.R. Merk, esq., Commissioner and Superintendent of the Derajat Division to the Chief Secretary of the Government of Punjab, dated 7th October, 1898. See, "East India (North-West Frontier): Papers Regarding British Relations with Neighbouring Tribes on the North-West Frontier of India," ed. His Majesty's Stationary Office (British Parliamentary Papers, 1901), p 75.

⁵⁴⁷ "Despatch from the Secretary of State for India to His Excellency the Right Honourable Governor General of India in Council, Dated January 28 1898" in "Parliamentary Papers: East India (North-West Frontier), Papers Regarding British Relations with Neighbouring Tribes on the North-West Frontier of India and Punjab Frontier Administration [Cd. 496]," in *Printed for His Majesty's Stationary Office*, ed. House of Commons Parliamentary Papers Online (London 1901), p 11-2.

⁵⁴⁸ In correspondence between British political agents and the Crown, we can see the agents referring to the "natural frontiers of India" as boundaries distinct from the spaces referred to as "tribal country." See, "Despatch from the Secretary of State for India to His Excellency the Right Honourable Governor General of India in Council, Dated January 28 1898" in *Ibid.*, p 7-9.

As such, within the colonial social imaginary the North-West Frontier always wavered uneasily, often envisaged as spaces of shifting alliances and allegiances. The ways in which the Frontier was imagined had some very important consequences in terms of the manner in which the Pakhtun was conceived and colonial-Pakhtun (and later Pakistan-Pakhtun) relations ultimately understood and managed.

B. Imagining the Pakhtun ‘Tribesmen’

Using the unruly and intemperate environment of the Frontier-space, the British typically imagined the Pakhtun tribesmen as violent, rebellious, and heady figures.⁵⁴⁹ These images of the Pakhtun contributed to judgments about their moral rectitude and trustworthiness.⁵⁵⁰ Accordingly, tribal relations were typically characterised as having a *lawless* quality.⁵⁵¹ Described as engaging in violence and thievery as a ‘way of life’,⁵⁵² the Pakhtuns and their honour codes have frequently been admonished for encouraging and executing blood feuds between members of their own and other competing tribal factions.⁵⁵³ In these various reports of life within the North-West Frontier, the Pakhtun clansman stands as an exotic, yet primal and dangerous, figure, inhabiting a territory that is at once barren and bountiful;⁵⁵⁴ a perilous and law-evading place, where everyday life is described as being brutal and uncertain.⁵⁵⁵ The ability to ‘define’ Pakhtun personality allowed the British to implement particularly draconian policies within the Frontier, using the explanation of having to manage a group that was ‘ungovernable’, violent, and incorrigibly corrupt.

i. *Frontier Landscape and Pakhtun Temperament*

Frontier topography has figured prominently in the narratives that consider its Pakhtun inhabitants’ ungovernable character. Mythic accounts of Pakhtun life in the Frontier see the heartiness of the land as an extension of the character of the men that inhabit it - “the land was

⁵⁴⁹ See Edward’s reprint of a correspondent report by a British political agent speaking of an uprising in the Swat province. See, David B. Edwards, *Heroes of the Age: Moral Faultlines on the Afghan Frontier* (Berkeley: University of California Press, 1996), p 172-4. Also see, Sir Evelyn Berkeley Howell, *Mizh: A Monograph on Government’s Relations with the Mahsud Tribe* (Oxford University Press Karachi, 1979), p 89.

⁵⁵⁰ Cuthbert Collin Davies, *The Problem of the North-West Frontier, 1890-1908, with a Survey of Policy since 1849* (London: Curzon Press, 1975), p 59.

⁵⁵¹ “East India (North-West Frontier): Papers Regarding British Relations with Neighbouring Tribes on the North-West Frontier of India,” ed. His Majesty’s Stationary Office (British Parliamentary Papers, 1901), p 11, 14.

⁵⁵² Bijaan Omrani, “The Durand Line: History and Problems of the Afghan-Pakistan Border,” *Asia Affairs* 40, no. 2 (2009): p 180.

⁵⁵³ Ibid.

⁵⁵⁴ Jules Stewart, *The Savage Border: The History of the North-West Frontier* (Gloucestershire: Sutton Publishing, 2007), p 1-35.

⁵⁵⁵ “East India (North-West Frontier): Papers Regarding British Relations with Neighbouring Tribes on the North-West Frontier of India,” ed. His Majesty’s Stationary Office (British Parliamentary Papers, 1901), p 9.

made for the men in it, not men for the land.”⁵⁵⁶ The Frontier-space was fashioned as a dangerous space, a “hard country of hard men, who bore arms almost from the moment their mothers first set them on the earth.”⁵⁵⁷ These colonial narratives have shown a degree of continuity, appearing to influence more contemporary accounts of Pakhtun life. For instance, Omrani notes that because the Frontier-space is difficult to navigate, and lacks the advances of more modern and diverse economies, the hill tribes of the Frontier have been transformed into a ‘particular sort’ of peoples.

In the absence of hedge funds or the financial services industry, what can the tribesmen do but turn to crime, raiding the more prosperous settled territories, preying on the merchants passing along the ancient trade routes towards Central Asia or Persia? Like many other mountain dwellers...they are fiercely proud of their independence. They hold in contempt the civilisation and governments of the settled world. They do not like to pay taxes, they do not have time for the conventional forms of law and law courts and they do not have any taste for laws imposed from distant capitals.⁵⁵⁸

The remoteness of the tribesman’s location is said to have contributed to his ability to maintain an ‘uncivilised’ tribal society, and preserve the primitive codes of the *Pakhtunwali*.⁵⁵⁹ According to this view, the tribal area’s cultural ecology appears to contribute, quite directly in fact, to Pakhtun deviance and criminality.

Conversely, there are also writers that suggest that perhaps Pakhtun ‘criminality’ was less about a history of seclusion translating into a passion for asserting continued independence, and more about a history of isolation leading to economic hardship.⁵⁶⁰ According to both scenarios, however, the natural environment is believed to have directly influenced the development of an identity for the hill tribes that sets them apart from the rest of the population as ‘outlaws’ and ‘bandits’ that embrace a way of living that outsiders perceive as injurious and illegal.⁵⁶¹

While direct administration over the Frontier had its origins in European commercial interest and defence strategy, its exercise was heavily influenced by forms of cultural domination through projections of backwardness and primitivity. This explains, for one, why there are

⁵⁵⁶ Olaf Caroe, *The Pathans, 550 Bc--Ad 1957* (London: Macmillan and Company Limited, 1958), xiii.

⁵⁵⁷ Charles Allen, *Soldier Sahibs: The Men Who Made the North-West Frontier* (London: Abacus, 2000), p 18.

⁵⁵⁸ Bijaan Omrani, "The Durand Line: History and Problems of the Afghan-Pakistan Border," *Asia Affairs* 40, no. 2 (2009): p 180.

⁵⁵⁹ James Spain, *The Pathan Borderlands* (The Hague: Mouton & Co., 1963), p 68.

⁵⁶⁰ Paul Titus, "Honor the Baloch, Buy the Pashtun: Stereotypes, Social Organisation and History in Western Pakistan," *Modern Asian Studies* 32, no. 3 (1998): p 660.

⁵⁶¹ Omrani recounts how many of the *Pashtuns* origin myths consider ‘great thieves’ as their original ancestors. See, Bijaan Omrani, "The Durand Line: History and Problems of the Afghan-Pakistan Border," *Asia Affairs* 40, no. 2 (2009): p 180.

settled and unsettled areas of the Frontier despite both places housing populations with a similar cultural and ethno-linguistic background. Yet, while the British were quite aware of these demographical similarities,⁵⁶² the Frontier agencies (in comparison to the districts) were deemed ungovernable on account of their, allegedly, 'barbaric' and 'culturally inferior' character. This meant that, several times over the course of history the Frontier represented, on the one hand, "a tribe of 'savages' and 'barbarians,'"⁵⁶³ while on the other, "...manliness...wit...good-fellowship...loyalty, even...heroism..."⁵⁶⁴ Pakhtun identity, like the buffer-space they occupied, wavered uncertainly between two distinct tropes: the independent, loyal, and intensely-honourable tribesmen⁵⁶⁵ *versus* the fanatical, violent, and lawless beast.⁵⁶⁶ The hybrid identity of the Pakhtun cast him as someone unstable, mythical, and often dangerous.

ii. *Making the 'Primitive' Substantiating the Modern*

Socio-political struggles within the Frontier have always been presented as materialising along a temporalised (modern/traditional) trajectory that morphed into determinations about Pakhtun cultural inferiority. Many of these claims pivot on the relationship between autonomy and history, suggesting that the remoteness of the Pakhtun space has had the effect of shielding them from historical progress. Some narratives assert that Pakhtun resistance to foreign occupation is tantamount to a rejection of modernity and a desire to maintain a traditional, read primitive, existence. In both situations, whether space has been used as a *reason* for, or as a *solution* to, their arrested development, the Pakhtun of the Frontier satisfies the colonial 'search for the primitive' against which to "define [the] primary human potential."⁵⁶⁷ As Diamond states, without the 'primitive' "it becomes increasingly difficult to evaluate or understand contemporary pathology and possibility."⁵⁶⁸

Conflict between the Frontier Pakhtuns and the British has predominately been interpreted as a struggle between tribal tradition and modern values, and thus never a conflict between two morally equivalent political entities. Indian society was understood as being at a crossroads, where the British presence signalled a transition from Indian traditionalism to European

⁵⁶² "East India (North-West Frontier): Papers Regarding British Relations with Neighbouring Tribes on the North-West Frontier of India," ed. His Majesty's Stationary Office (British Parliamentary Papers, 1901), p 75.

⁵⁶³ Jules Stewart, *The Savage Border: The History of the North-West Frontier* (Gloucestershire: Sutton Publishing, 2007).

⁵⁶⁴ Olaf Caroe, *The Pathans, 550 Bc--Ad 1957* (London: Macmillan and Company Limited, 1958), p 345.

⁵⁶⁵ Akbar S. Ahmed, "Colonial Encounter on the North-West Frontier Province: Myth and Mystification," *Economic and Political Weekly* 14, no. 51 (1979).

⁵⁶⁶ See, for instance, *The Punjab Murderous Outrages Act (1867)*.

⁵⁶⁷ Stanley Diamond, *In Search of the Primitive: A Critique of Civilisation* (London: Transaction Books, 1981), p 119.

⁵⁶⁸ Ibid.

modernity; a choice between 'regressing' to the status of the 'tribals' or progressing to the standards of the British. Representations of the 'tribal' Pakhtun, therefore, became a necessary accompaniment to the justification of colonial power, and the Frontier was thus divided and enclosed – to, purportedly, keep the savagery of traditionalism at bay. This rendering of Pakhtun-Frontier relations further maps onto ideas about law and legality, which construct Pakhtun normative orders as customary 'honour codes', while maintaining the universal supremacy of British law.

It is certain from correspondences between the Government of Great Britain and its agents in India that the political officers believed they were modernising and civilising Indians. We can find evidence of this in the numerous letters written to the Parliament during the colonial period, many of which assert a "sincere interest in the welfare of the native community, and the desire to be in some degree instrumental in conferring upon them the blessings of our noble [juridical] institution."⁵⁶⁹ However, while India was seen as distinctly separate from England,⁵⁷⁰ the length to which British officers became involved in attempts to reconcile the British and native modes of dispute settlement and adjudication⁵⁷¹ demonstrated an interest that was never extended to the way in which law and order was instituted within the Frontier. This implies that, at the very least, the British felt that the non-Frontier communities of India were capable of modernising, of converting aspects of their social life in accordance with the institutional models being proposed by their colonial masters.

The potential for modernisation was never perceived as being within the realm of possibility for the Frontier. Many accounts of the Pakhtun community speak of their tradition of *badal* (the codes of the *Pakhtunwali* governing retribution for grievances) as an archaic response to dispute settlement. It is, therefore, not novel to find accounts that conveyed that, "feuds, estrangements, and affrays are of constant occurrence; the public roads and private property are alike unsafe..."⁵⁷²; or recollections of feudal violence which relay: "I have felt very suspicious of our strange, wild, assistants, with their hungry-looking knives and tulwars...long guns and

⁵⁶⁹ Granville George and E. Granville Leveson-Gower, "First Report from the Select Committee of the House of Lords, Appointed to Inquire into the Operation of the Act 3 & 4 Will. 4, C. 85, for the Better Government of Her Majesty's Indian Territories; and to Report Their Observations Thereon to the House; and to Whom Leave Was Given to Report from Time to Time to the House; and to Whom Were Referred Several Petitions, Papers and Documents, Relative to the Subject-Matter of the Inquiry; Together with the Minutes of Evidence, and Appendix. Session 1852-3," in *Document type: House of Commons Papers; Reports of Committees* (1852), p 682.

⁵⁷⁰ Ibid., p 683.

⁵⁷¹ Ibid., p 682-93, Appendix C. Indeed, many of them felt that India did have a hierarchical system of organisation that was in a state of decay. As such, they at least saw the modernisation of India within the realm of possibility. See, Bernard S. Cohn, *Law and the Colonial State in India*, ed. June Starr and Jane F. Collier, History and Power in the Study of Law (U.S.A: Cornell University Press, 1989), p 132.

⁵⁷² Allen quoting Bellew. See, Charles Allen, *Soldier Sahibs: The Men Who Made the North-West Frontier* (London: Abacus, 2000), p 96.

general *thievish* appearance.”⁵⁷³ The dehumanisation of Pakhtun clans to where they become capable of uncontrollable violence and unbridled greed,⁵⁷⁴ constructed the area as a tumultuous and perilous space, where the persistent threat of violent death made the efforts of the colonial officer even more heroic and commendable. In these sets of narratives we see the Pakhtun tribesman as both the shaper of space, as well as the product of the Frontier-space.

In more contemporary narratives the Pakhtun’s dislike of ‘foreigners’ has been translated into an intense reverence of autonomy and self-reliance, that increasingly takes a ‘legal’ turn when it is understood to convey a sense of ‘lawlessness’ within Frontier. This suggests that a value for autonomy, most visibly manifested through exercises of resistance to alien (i.e. European) intervention, signals the absence of all the things we traditionally associate with a legal order – peace, predictability, good governance, social justice, equality. The colonial encounter is shaped by perceptions of the tribal areas’ “complete rejection of the twentieth century which in [the Pakhtuns] eyes the British represented.”⁵⁷⁵ These spaces are described as ‘closed systems’ emblematic of “not only a different world, [but] almost a different century.”⁵⁷⁶ To be ‘tribal’ therefore, was symbolic of a repudiation of all the things that not only make life predictable, just, and harmonious, but also signalled the absence of institutions and structures which represented European conceptions of the ‘good life’.⁵⁷⁷

In positioning the Pakhtun outside the boundaries of legality, these constructions essentially undervalued, or completely ignored, the persistence of alternative forms of normative ordering which organised social and political life within the Frontier. The normative value and influence that the *Pakhtunwali* exerts on Pakhtun social relations is either minimised, completely discounted, or characterised as exceedingly barbaric. Instead, the Pakhtun-dominated Frontier is perceived as lacking legitimate structures of social regulation.

C. Identifying Space and Spacing Identities and the Exercise of Power

What is important about revealing the mutually-constitutive relationship between the Frontier-space and Pakhtun identity is the fact that it has, throughout history, become the basis of

⁵⁷³ Quote by a soldier of the NWFP, Reynell Taylor, describing his *Orakzai* protectors in Allen, *Ibid.*, p 117.

⁵⁷⁴ In many colonial narratives the tribesmen are likened to wild animals. See, Olaf Caroe, *The Pathans, 550 Bc--Ad 1957* (London: Macmillan and Company Limited, 1958), p 393. Also see, the observations made by a British tribal agent, Herbert Edwards (1953), as quoted in Caroe’s *The Pathans*, ———, *The Pathans, 550 Bc--Ad 1957* (London: Macmillan and Company Limited, 1958), p 336.

⁵⁷⁵ Akbar S. Ahmed, "An Aspect of the Colonial Encounter in the North-West Frontier Province," *Asian Affairs* 9, no. 3 (1978): p 319.

⁵⁷⁶ ———, "Colonial Encounter on the North-West Frontier Province: Myth and Mystification," *Economic and Political Weekly* 14, no. 51 (1979): p 2093.

⁵⁷⁷ See Ahmed’s comments that modernity was represented by educational institutions, railroads, and facilities such as electricity. See, ———, "An Aspect of the Colonial Encounter in the North-West Frontier Province," *Asian Affairs* 9, no. 3 (1978): p 319.

differential treatment and the implementation of heavy-handed and oppressive structures of governance within the Frontier. In the various ways by which the Frontier has been constructed and managed it is possible to identify the processes and effects of Occidental Legality.

British administration of the Frontier relied heavily on an 'Orientalist' approach to tribal relations. Adopting a strategy of non-interference, the British allowed the Pakhtun communities of the Frontier to exercise self-government and employ customary law for the resolution of inter-group disputes. The space was administered by indirect rule, where local chiefs or *maliks* acted as brokers for the British and spokesmen for the tribe-members. In order to maintain stability and peace within the area, the *maliks* were enticed with monetary subsidies in return for keeping looting and protest at bay.⁵⁷⁸ In addition, authority over colonial-Frontier relations was entrusted to only those agents who knew the tribes and possessed expert 'cultural' knowledge (i.e. language and knowledge of traditional custom including the *Pakhtunwali* honour code).⁵⁷⁹ These relationships themselves reveal an internal differentiation within the category of 'Pakhtun', and reveal the dynamicity and complexities of a colonial experience that cannot be reduced to the simple binaries of coloniser/colonised.

Lord Curzon, who became Viceroy in 1899, attempted to administer the Frontier by encouraging British interaction with Pakhtun tribes in an effort to tame the "lawless and predatory instincts of the hill men."⁵⁸⁰ By encouraging dialogue between the Pakhtuns and European administrators, Curzon's policies helped to further blur the lines between the settler and native populations. British policies for managing the Frontier during this time centred on forms of 'cultural understanding', where Political Officers were commanded to manage the

⁵⁷⁸ In some ways the British stance reflects back Vitoria's claims about *jus gentium* and the inclusion of Others as 'human' being dependent on maintaining a British right of sojourn and travel. The *maliks*, as several forms of imperial correspondence convey, were considered 'friends' only to the extent that they helped British goods and people travel through annexed territories without being raided by the tribesmen. See, "Letter from W.R. Li Merk, Esq., C.S.1, Commissioner and Superintendent Derajat Division to the Officiating Chief Secretary to the Government of Punjab, Dated September 11, 1898 in 'East India (North-West Frontier): Mahsud-Waziri Operations (1902) [Cd. 1177]," in *Printed for His Majesty's Stationary Office*, ed. House of Commons Parliamentary Papers Online (London1901), p 5-6.

⁵⁷⁹ James Spain, *The Pathan Borderlands* (The Hague: Mouton & Co., 1963), p 121. During Lord Curzon's time as Viceroy, political agents had to demonstrate a proficient grasp of the Pashto language and exhibit a willingness to become "immersed in the ways of the Frontier." See, Akbar S. Ahmed, "Colonial Encounter on the North-West Frontier Province: Myth and Mystification," *Economic and Political Weekly* 14, no. 51 (1979): p 2093. As Schwarz explains, for Curzon "the frontiers were not created by those Europeans settled in the outer reaches of the colonies. Rather they were the product of the specialised knowledge organised by a rare breed of men who possessed the mastery of both periphery and centre." He understood the colonial agent as a master of the 'here and there', possessing a hybridity which Curzon linked to 'knowledge' about the native. Curzon saw the acts of 'bordering', of "tracing lines upon the unknown areas of the earth", as powerful exercises of *realpolitik*. See, Bill Schwarz, *Memories of Empire Volume I: The White Man's World* (Oxford: Oxford University Press, 2011), p 113.

⁵⁸⁰ Lord Curzon's despatch to the Punjab Government. See, "Parliamentary Papers: East India (North-West Frontier), Papers Regarding British Relations with Neighbouring Tribes on the North-West Frontier of India and Punjab Frontier Administration [Cd. 496]," in *Printed for His Majesty's Stationary Office*, ed. House of Commons Parliamentary Papers Online (London1901), p 12.

Frontier by respecting and learning about Pakhtun culture.⁵⁸¹ Through these modes of 'knowing the Pakhtun', Curzon's policies had the effect of dehistoricising and reducing Pakhtun culture "to component resources that can be appropriated" by anyone.⁵⁸² The unsettling use of cultural knowledge as a form of control is further problematised by those narratives that genuinely perceived Europeans as patrons of Pakhtun identity and ways-of-being.⁵⁸³ In some particularly problematic instances, these convictions had the effect of spatialising Pakhtun ethnicity.⁵⁸⁴ Belief in a 'European revitalisation' of Pakhtun culture at once represents a manipulation of the unequal distribution of power that characterised colonial-colonised relations, and a naive misconception about the parity of British-Pakhtun relations. These contrasting interpretations of colonial administration also reflect an enduring conflict that plagues modern understandings of the role of political power within heterogeneous societies. They reveal unease between the dual objectives of social regulation and cultural protection, and complicate the role of contemporary liberal law and forms of governance.

In citing the challenging terrain and hearty landscape as one reason for establishing stricter designs of social control, colonial agents were able to conceal the progressive racialisation of the Frontier-space. The imagined separation between the Frontier and 'natural' Indian territory, was made real through the adoption of a colonial strategy of non-intervention in tribal affairs, reinforced by the implementation of the Frontier-Crimes Regulation (FCR). The FCR is a particularly brutal system of regulation that continues to operate within the Frontier provinces

⁵⁸¹ Christian Tripodi, "Peacemaking through Bribes or Cultural Empathy? The Political Officer and Britain's Strategy Towards the North-West Frontier, 1901-1945," *The Journal of Strategic Studies* 31, no. 1 (2008).

⁵⁸² Simon Dalby, "Global Environment/Local Culture: Metageographies of Post-Colonial Resistance," *Studies in Political Economy* 67(2002): p 64.

⁵⁸³ Bankey Bihari Misra, *The Central Administration of the East India Company, 1773-1834* (Manchester: Manchester University Press, 1959), p 16. In his discussion of the civil administration of India by the BEIC, Misra speaks of the many ways in which European jurisprudence greatly improved the 'primitive' forms of group justice employed by indigenous communities in India. He bases his moral judgments on the European enlightenment principles of individualism, noting that European forms of adjudication were commendable precisely because they "loosen[ed] the bonds of caste and kinship." ———, *The Central Administration of the East India Company, 1773-1834* (Manchester: Manchester University Press, 1959), p 259-62. The civilising potential of the British-Indian encounter was all but lost on Ernst, who argued that, while the first years of the colonial enterprise were marked by expressions of British wonderment and marvel,⁵⁸³ "the British in India had by the early nineteenth century developed a distaste for things Indian. They had come to view nearly any idea that originated in Europe as the ultimate yardstick against which to measure policies in the East." See, Waltraud Ernst, "Idioms of Madness and Colonial Boundaries: The Case of the European and 'Native' Mentally Ill in Early Nineteenth Century British India," *Comparative Studies in Society and History* 39, no. 1 (1997): p 150. Indeed, the Reverend J.P. Jones, writing in 1899, describes British involvement in India as "perhaps, the most stupendous work accomplished by any nation in the progress of the human race." He argues that those that define Britain's work as anything other than complete selflessness with do not fully comprehend the extent of its influence over human progress among "an alien race." See, J.P. Jones, "British Rule in India," *The North American Review* 168, no. 508 (1899): p 336. Jones article speaks to the sentiment of the times. His crude characterisation of Indian society creates an enticingly benevolent and altruistic picture of British power, and categories Europe at one end of the pole of human progress, while the Indian is confined to the other.

⁵⁸⁴ For instance, Curzon stipulated that the ethnic makeup of the Frontier-space, which was to form a new province of India (composed of the trans-Indus districts of Peshawar, Kohat, Bannu, Dera Ismail Khan, Dera Ghazi Khan, Hazara district, the Pakhtun-dominated Political Agencies along the Durand Line), be primarily Pakhtun so as to facilitate the exercise of self-government.

of Pakistan even today.⁵⁸⁵ There are several reasons why the FCR is problematic. First, it was implemented on the basis of respecting Pakhtun autonomy and self-government. Despite this, however, it uses a British model of codification which has the effect of “stunt[ing] the natural progression of customary practices and prevent[ing] its further growth.”⁵⁸⁶ The FCR employs forms of communal punishment to hold *maliks* and all tribe members directly responsible for criminal actions where no offender can be found.⁵⁸⁷

Second, the FCR was not used as a way of protecting Pakhtun culture, but often operated as a method for neutralising the Frontier of its normative content. Sections 31-33 of the FCR, for example, reveal a strong spatialisation of British power within the Frontier. These provisions banned the establishment of villages and township in the vicinity of British controlled areas, including centrally-managed roads that run through the Frontier, and completely prohibited the building or continued use of *hujras* or *chauks*.⁵⁸⁸ In restricting the place-making practices of the Frontier-Pakhtuns, these provisions of the FCR created distance between adjacently-located administered and non-administered places. In essence, then, this practice of territoriality served to create a “conceptually empty space,”⁵⁸⁹ spaces devoid of social life, emptied of legal and political meaning. Wrongly giving the impression that the area being contained was somehow unregulated or neutral, the operation of the FCR diverted attention away from how the practice of ‘emptying,’ itself, represented an exercise of power.

Throughout its colonial history the North-West Frontier has been administered through an exercise of colonial of power that relies on networking geography and identity. This has been illustrated by, for one, grounding Pakhtun temperament in the turbulent topography of the Frontier. In other instances we see Pakhtun identity being ‘partitioned’. For example, the artificial borders between the settled and unsettled areas of the Frontier have had the effect of defining an ethnically and linguistically homogenous population along two separate historical axis. While the Frontier-plains were selected for settlement based on its agricultural promise and its manageable geography, the British often represented its Pakhtun inhabitants as more

⁵⁸⁵ Brutal in the sense of authorising collective punishment for individual wrongs, and allows political authorities to blockade an outlaw’s village until he surrenders. The FCR has been described as instituting a system of law and order, rather than aiming to protect the due process rights of tribal members. See, Jules Stewart, *The Savage Border: The History of the North-West Frontier* (Gloucestershire: Sutton Publishing, 2007), p 151-3.

⁵⁸⁶ Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?* (Hague: Kluwer Law International, 2000), p 182.

⁵⁸⁷ Ian Talbot, *Pakistan, a Modern History*, 3rd Edition (London: Hurst & Co., 2009), p 59.

⁵⁸⁸ Hujras or chauks can be most simply described as infrastructures established as communal or public meeting places. For a detailed description of a Pakhtun *hujra* and its social and political functions see, Mughal B. Khan, Abdul R. Ghuman, and Hashim N. Hashmi, “Social and Environmental Impact of Hujra,” *Environmental Justice* 1, no. 4 (2008).

⁵⁸⁹ Robert David Sack, *Human Territoriality: Its Theory and History* (Cambridge: Cambridge University Press, 1986), p 33.

responsive to modernisation. Thus, a temperate environment becomes the basis of a more manageable and less rebellious construction of its people. In comparison, the hill-tribes were described as unruly and disagreeable. While the plains-people were 'modernised', the trans-Indus tribes were perceived as static, inflexible, and attached to a traditional culture that incited brutality and malevolence. This view of the settled versus unsettled areas has been, as I will further discuss in Section (3) of this chapter, been institutionalised through the law and the structures of governance that prevail in modern-day Pakistan. The Pakhtun, therefore, embodies two separate and non-intersecting identities. This partitioning of identity is also illustrated by the myriad narratives that speak of Pakhtun hybridity and the ability of both the colonial agent to mimic aspects of Pakhtun culture, and the Pakhtun to espouse, and sometimes manipulate, aspects of European culture. Through these various narratives of the Frontier we are given the distinct impression that the Pakhtun, particularly the Pakhtun located within the mountainous (and thus difficult to settle) regions of the Frontier, represents an unstable and threatening figure, stubbornly consumed with maintaining an archaic tradition that defies the progressive thrust of modernity. In these instances, the Pakhtun is catapulted out of a dynamic European history, and represented as a relic of a bygone era that is worthy of both our contempt and pity.

4. Postcolonial Law-Making & the Legal Status of the FATA

The 1947 Partition freed India from colonial rule and produced two sovereign States: India and Pakistan. British India was carved up amidst great violence, displacement, and depredation.⁵⁹⁰ As the population of the subcontinent scrambled to locate themselves on the side of the border that guaranteed them the greatest religious protection,⁵⁹¹ authors remarked that the crumbling of the colonial Empire could be "defined in terms of reconciling the principles of freedom and unity, of preserving in freedom the unity that Empire had imposed."⁵⁹²

While the population of almost four hundred million remained largely unconsulted, the British, along with politicians from the Muslim League and the Indian National Congress, negotiated the

⁵⁹⁰ Amtul Hassan, *Impact of Partition: Refugees in Pakistan: Struggle for Empowerment and State's Response Rcsc Policy Studies 37* Rcsc Policy Studies (New Delhi: Manohar, 2006). Also see, I Ahmed, "The 1947 Partition of India: A Paradigm for Pathological Politics in India and Pakistan," *Asian Ethnicity* 3, no. 1 (2002).

⁵⁹¹ Amtul Hassan, *Impact of Partition: Refugees in Pakistan: Struggle for Empowerment and State's Response Rcsc Policy Studies 37* Rcsc Policy Studies (New Delhi: Manohar, 2006), p 12.

⁵⁹² R.J. Moore, "The Problem of Freedom with Unity: London's India Policy, 1917-47," in *Congress and the Raj: Facets of the Indian Struggle 1917-47*, ed. D.A. Low (London: OUP, 2006), p 376. Moore's work casts doubt on one of the prevailing explanations for partition, that it was an imperial policy aimed at 'dividing and conquering' once colonised populations. Moore's historical narratives makes an attempt to "trace the British commitment to the principles of freedom." See, ———, "The Problem of Freedom with Unity: London's India Policy, 1917-47," in *Congress and the Raj: Facets of the Indian Struggle 1917-47*, ed. D.A. Low (London: OUP, 2006), p 375.

new borders of the two post-partition States using methods of boundary-making that relied on census results to identify regions with majority Hindu/Muslim populations.⁵⁹³ This gave rise to a most illogical territorial configuration for Pakistan, where the Eastern and Western blocs of its land were bisected by over 6,000 miles of Indian Territory. In a matter of weeks, millions of Indians found themselves confined to the territories of a new State that was suddenly hostile towards their presence.⁵⁹⁴ The demarcation of State boundaries and border-politics became routine processes of enemy-making, with the consequence that significantly large numbers of individuals that found themselves 'on the wrong side of the boundary' packed up their belongings, left ancestral homes, and relocated to unfamiliar lands and unwelcoming communities.⁵⁹⁵

The North-West Frontier was no stranger to the political battles engulfing the rest of the subcontinent. These conflicts, however, took an even more problematic turn as Afghanistan moved to contest Pakistan's inheritance of the Frontier.⁵⁹⁶ Calls for Pakhtun autonomy had been gaining momentum since before the Partition,⁵⁹⁷ and only grew stronger after the negotiating parties failed to include a separate Pakhtun State as a potential option during the pre-partition referendum.⁵⁹⁸ With only the choice of joining either Hindu-dominated India or Muslim-Pakistan, the predominately Muslim Pakhtuns of the North-West Frontier cast a majority vote in favour of the latter.⁵⁹⁹

Also during this, we begin to see the legal institutionalisation of the settled versus non-settled areas of colonial rule along the Frontier. For example, under the *West Pakistan Act* of 1955, Punjab, the North-West Frontier Province (NWFP), Sindh, Balochistan, Karachi, Bahawalpur, Khairpur, the Balochistan States, Amb, Chitral, Dir, and Swat were all amalgamated into the single province of West Pakistan. However, the Frontier districts and agencies, sandwiched

⁵⁹³ As Khan notes, "borders [were]...devised from a distance; the land, villages and communities to be divided were not visited or inspected by the imperial map-maker..." See, Yasmin Khan, *The Great Partition : The Making of India and Pakistan* (New Haven Conn. ; London: Yale University Press, 2007), p 3.

⁵⁹⁴ Seven million displaced Indian Muslims (*mojahirs*) were met with resentment in Pakistan, where the already settled populations saw their presence as both an economic burden and a security threat to a State still struggling to take its first steps. See, Feroz Ahmed, *Ethnicity and Politics in Pakistan* (New York: Oxford University Press, 1998), p 89-158.

⁵⁹⁵ Seven million displaced Indian Muslims (*mojahirs*) were met with resentment in Pakistan, where the already settled populations saw their presence as both an economic burden and a security threat to a State still struggling to take its first steps. See, *Ibid.*

⁵⁹⁶ James Spain, *The Pathan Borderlands* (The Hague: Mouton & Co., 1963), p 193.

⁵⁹⁷ *Ibid.*, p 196-200.

⁵⁹⁸ This oversight was heavily criticised by the *Khudai Khitmatgars*, a Pakhtun political party operating within India prior to its balkanisation. See, *Ibid.*, p 198-9.

⁵⁹⁹ Though the results of this vote have, since, been heavily contested given that only 51% of eligible voters turned out for the vote, and it has been suggested that the remaining voters refrained from casting a ballot in protest for not being offered the possibility of secession. See, *Ibid.*, p 200.

between the edges of the NWFP and the Durand Line, remained untouched by this Act, and the administration of these areas fell to the local political agents (see fig. 4.1). More importantly, it was decided that the colonial laws governing the tribal districts and agencies, including the Frontier Crimes Regulation, would remain in force until sufficient amendments were made to either repeal or modify existing statutes.⁶⁰⁰ Furthermore, communal representation was prohibited within any of the regions, and the secessionist sentiments of the Frontier were dampened through the banning of political parties within this area and the criminalisation of political actors aligned with the 'Pakhtunistan' movement.⁶⁰¹ The form of political organisation put in place by the *West Pakistan Act* was in operation till 1973, when Pakistan was formally declared a federal republic and subdivided into Sindhi-, Balochi-, Punjabi-, and Pakhtun-majority provinces. The NWFP was comprised of three administrative units: the Settled Areas, the Provincially Administered Tribal Areas, and the Federally Administered Tribal Areas (see 4.2).

⁶⁰⁰ Alan Gledhill, "Pakistan; the Development of Its Laws and Constitution," in *The British Commonwealth the Development of Its Laws and Constitutions*, V. 8, ed. George W. Keeton (London: Stevens, 1957), p 76.

⁶⁰¹ James Spain, *The Pathan Borderlands* (The Hague: Mouton & Co., 1963), p 201-2.

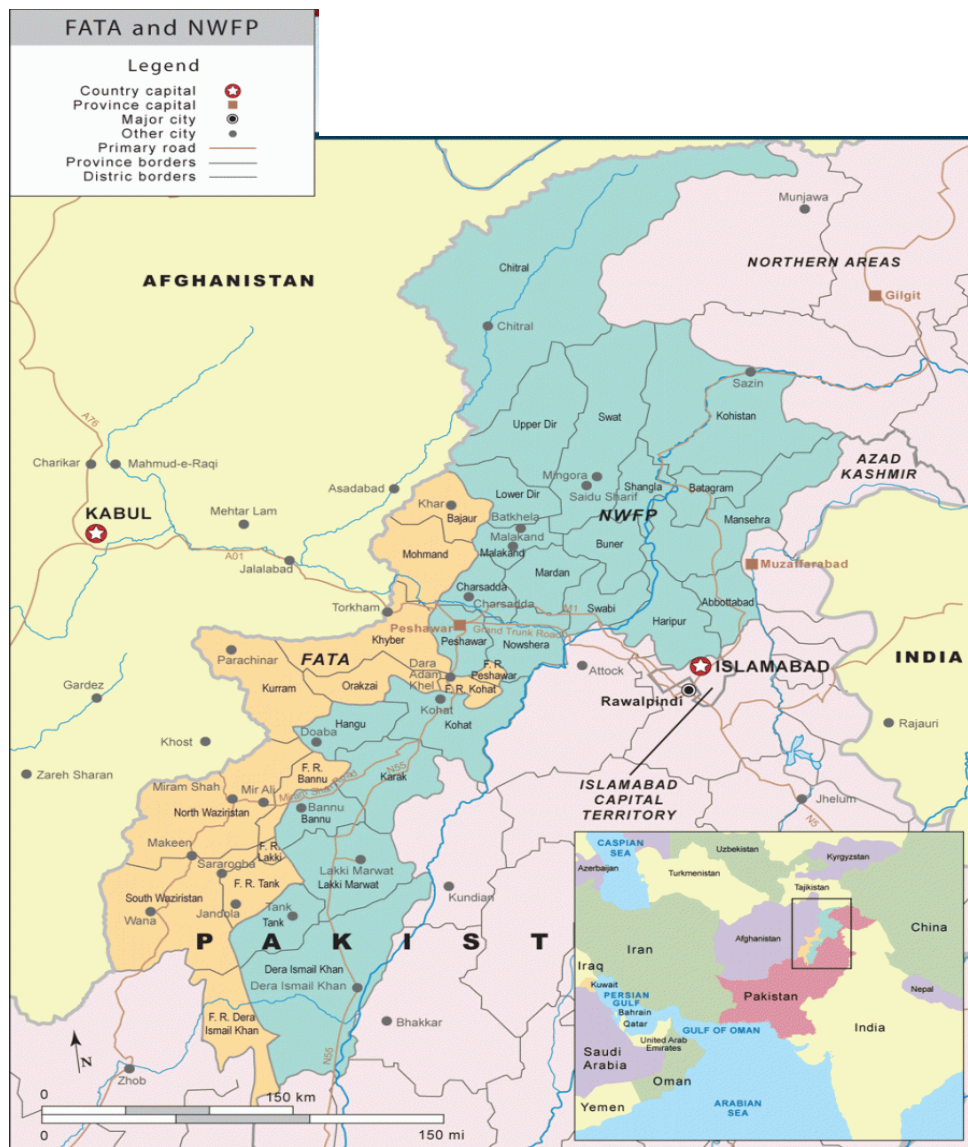


Figure 4.1 – Map of Pakistan Demarcating the FATA and NWFP (now known as the Khyber Pakhtunkhwa Province). Retrieved from: <http://www.criticalthreats.org/pakistan/fata-and-nwfp-map>

Figure 4.2

The Khyber Pakhtunkhwa has an area of 74,521 km and a population of approximately 22 million. It is composed of three administrative units:		
The Settled Areas (SA)	The Provincially Administered Tribal Areas (PATA)	The Federally Administered Tribal Areas (FATA)
Made up of the districts of: Abbottabad, Bannu, Battagram, Charsadda, Dera Ismail Khan, Hangu, Haripur, Kohistan, Karak, Lakki Marwat, Mansehra, Mardan, Nowshera, Swabi, Peshawar, and Tank.	Made up of the districts of: Malakand Agency, Upper Dir, Lower Dir, Chitral, Swat, Buner, Shangla, Khala Dhaka, tribal areas of Kohistan, and the State of Amb (which is now submerged under Tarbela Dam Reservoir).	Made up of the 7 tribal agencies of: Bajaur Agency, Orakzai Agency, Mohmand Agency, Khyber Agency, Kurram Agency, North Waziristan, and South Waziristan. And 6 Frontier Regions: F.R. Bannu, Central Kurram, F.R. Dera Ismail Khan, F.R. Kohat, F.R. Lakki, F.R. Peshawar and F.R. Tank.

A. The Constitutionally Anomalous Status of the Tribal Areas

Constitution-making in Pakistan has been, to a tremendous degree, driven by the pressures of ethnopolitics.⁶⁰² The federation's arrangement was promulgated along ethnic lines, and thus, each province, to some extent, illustrates a degree of ethnic and cultural homogeneity.⁶⁰³ This way of conceptualising and organising the Nation – as an aggregate of different ethnicities – has largely divided loyalties based on ethnic interests and worked to essentialise ethnic identities. Creating disconnected and competing conceptions of group identity, each vying for greater political power over and within the State, these divisions have turned Pakistan into a hotbed of ethnic rivalries, where politics is approached not from the perspective of a shared respect for common political and social values, but based on the need to preserve the cultural integrity of one's own ethnic community. As such, ethnic movements within Pakistan typically "take the form...of subnational movements, directed against the central power, demanding regional autonomy."⁶⁰⁴

The preamble and introductory articles of the 1973 Constitution include many of the same principles and aspirations as constitutions of other democracies around the globe. There is a call for the tolerance of diversity, and respect for equality and democracy. In Art.1 the Khyber Pakhtunkhwa (previously the North-West Frontier Province) is included as part of the territory of the new State, and its inhabitants are recognised as Pakistani citizens. Citizens of the State are accorded important fundamental rights, including equal standing before the law, security of person (including safeguards against detention and the right to a fair trial), and freedom of association, assembly, and speech. Art.2 designates Islam as the State religion, though there is frequent mention of an acknowledgement of the equality of religious minorities. The property rights of citizens are affirmed in Art.23 and 24, and the right to education and freedom from

⁶⁰² As religion was identified as the primary axis of conflict, much of the literature on India has a tendency to divide its population along the Muslim/Hindu binary. This has the effect of projecting the subcontinent's people as, otherwise, ethnically and linguistically homogeneous. While several authors have brought this inaccuracy into sharper focus by looking at the vast linguistic and ethnic differences amongst the population of Pakistan, they tend to limit their focus to the particularities of the three major – and indeed the most powerful – ethnic groups: Sindhi, Baluchi, and Punjabi. I Talbot, "The Punjabization of Pakistan: Myth or Reality?," in *A History of Pakistan and Its Origins*, ed. Christophe Jaffrelot and Gillian Beaumont (London: Anthem Press, 2002). Also see, Shaheen Sardar Ali and Javaid Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan : Constitutional and Legal Perspectives*, Nordic Institute of Asian Studies Monograph Series No. 84 (Richmond, Surrey: Curzon, 2001). Also see, Feroz Ahmed, *Ethnicity and Politics in Pakistan* (New York: Oxford University Press, 1998).

⁶⁰³ The model of federalism prevailing in Pakistan is slightly different than other federations. While it is more common that a federalist political model entails several provincial units coming together to cede a degree of their power to one central authority in order to maintain stability within the State, in Pakistan the federalist model is somewhat inverted. This means that the central government devolves a degree of its own powers to "subordinate provincial units." See, C Baxter, "Constitution Making: The Development of Federalism in Pakistan," *Asian Survey* 14, no. 12 (1974): p 1075.

⁶⁰⁴ Hamza Alavi, "Politics of Ethnicity in India and Pakistan," in *Perspectives on Modern South Asia: A Reader in Culture, History, and Representation*, ed. Kamala Visweswaran (Oxford: Blackwell Publishing, 2011), p 87.

discrimination in public spaces are both recognised. Interestingly, unlike the preceding Constitutions of 1956 and 1962, the current Constitution cannot be changed. Instead, it has been stipulated that only amendments can be made to alter the effect of its provisions. For all intents and purposes, the Pakistani Constitution appears to be a legal instrument drafted according to the traditional liberal mould. Yet, there are certain aspects of the instrument, in particular the sections that both implicitly and explicitly concern the tribal areas of the State, which require further scrutiny.

i. Tribal Rights of Autonomy

Article 247 specifically deals with the tribal Frontier's right of cultural autonomy, and extends this right to both the Provincially Administered Tribal Areas (PATA) and the Federally Administered Tribal Areas (FATA).⁶⁰⁵ The Settled Areas of the Frontier, along with the five districts of the PATA, collectively make-up the Khyber-Pakhtunkhwa Province (KPK).⁶⁰⁶ The area is administered by a Provincial Governor appointed by the President of Pakistan. The FATA, in comparison, is directly administered by the Federal Government, on the direction of the President.

Borrowing extensively from the British *Government of India Act* (1935) - administered within the 'Excluded Areas' of Pakistan until the 1956 Constitution came into force - Art. 247 protects cultural autonomy by curbing the law-making powers of the legislative and judicial branches of the State. First, any Acts passed by the *Majalis-e-Shoora* (Parliament) are not applicable to the PATA and FATA unless authorised by the President (in the FATA) or the Governor of the Province (in the case of the PATA). Second Art.247 nullifies the jurisdiction of the Supreme and High Courts in relation to disputes originating within the protected areas. Both the Governor of the Province and President are given wide scope for determining and implementing regulations for the "peace and good government" of the PATA and FATA. Last and, perhaps, most disconcertingly, Article 247(6) also gives the President the power to abolish the protected status of all or any part of the Tribal Areas, which - because Pakhtun identity and juridical autonomy has a history of having been linked to the space that they occupy - essentially empowers an external authority to deny the distinctiveness of their identity altogether.⁶⁰⁷

⁶⁰⁵ I will refer to semi-autonomous regions of the FATA and PATA collectively as 'Tribal Areas'.

⁶⁰⁶ The Khyber-Pakhtunkhwa Province was formerly called the North-West Frontier Province (NWFP). Though this was changed

⁶⁰⁷ Though this provision has the added stipulation that the President must consult with the tribal elite or *jirga* before such a measure is adopted, Pakistan has, in the past removed the tribal status of a protected area without consulting the tribesmen. See, Raja Tridiv Roy, *The Departed Melody: Memoirs* (Islamabad, Pakistan: PPA Publications, 2003), p 195. Also see, Raja Devasish Roy, "The Ilo Convention on Indigenous and Tribal Populations, 1957 and the

The Constitution further demonstrates a temporalisation of social difference, where several Articles on Fundamental Rights refer to the State's duty to assist in the progress and protection of the "socially and educationally backward classes." If we look at the Directive Principles of the earlier 1956 Constitution, we can find that this 'backwardness' refers to the inhabitants of the 'Special Areas' (partly comprised of spaces that would later make up the 'Tribal Areas').⁶⁰⁸ In classifying these communities in an evolutionary manner, the State is essentially affirming its own historical continuity, a continuity that stems from the colonial encounter and goes forward unceasingly. It speaks in reference to a direct dichotomy between the progressive and the non-progressive or 'backward', and thus affirms more than a mere recognition of the State's duty to 'help', it emphasises the rest of the Nation's superiority in relation to these groups.

Thus, in many ways, the FATA fulfils Pakistan's search for the primitive, a society against which the newly emergent State is able to construct its own 'Europeanised' (or 'modernised') identity. The FATA serves an important cultural purpose, an imagined geography of regress, which works to displace Pakistan's own experiences with colonialism, and its own self-perceptions of alterity. Law undeniably works to further reinforce these characterisations of the FATA, and we see this quite clearly in how Pakistan understands its legal culture as firmly rooted within the European tradition.⁶⁰⁹ These perceptions operate to preserve the view that it was the Europeans that brought law to India, and effectively renders all native forms of normative ordering as alien and, essentially, unofficial law.

B. Liminality and the North-West Frontier

The Tribal Areas have, throughout both its colonial and postcolonial history, represented a liminal space. First, as a buffer zone between Afghanistan and India, the Frontier was politically integrated with the subcontinent but never quite made that leap within the colonial imagination. In referring to it as a 'politically neutral zone', the British minimised the Frontier inhabitants' capacity for political agency.⁶¹⁰ As a space 'unclaimed' the Frontier was effectively erased from the colonial map (see fig. 4.3).

Laws of Bangladesh: A Comparative Review," in *Project to Promote ILO Policy on Indigenous and Tribal Peoples and ILO Office* (Dhaka: Bangladesh, 2009), p 31-2.

⁶⁰⁸ Art.3 states: "[t]he state shall endeavour to...promote the educational and economic interests of the backward classes and scheduled castes, the people of the special areas." See, GW Choudhury, "The Constitution of Pakistan," *Pacific Affairs* 29, no. 3 (1956): p 249.

⁶⁰⁹ See my discussion on p 34.

⁶¹⁰ A claim that is further bolstered by the fact that the State has prohibited FATA residents from organising political parties, effectively ensuring that its interests are represented by Islamist candidates. This further reconstructs the area as a space 'steeped in tradition' and irresponsive to political and social progress.

Now, as a 'State frontier' the Tribal Areas demarcate the end of one jurisdiction and political authority and the beginning of another.⁶¹¹ While, to some extent, still serving as a transitory 'threshold' space, the Frontier performs a most interesting function as the gatekeeper of the nation.⁶¹² In this role its own normative richness is minimised. State borders give the impression that the power of the political entity located on one side of the border is sharply and precisely differentiated from the power of the political entity on the other. Yet the Tribal Frontier operates as a transitory space that is, at once, incorporated into the territory of Pakistan, yet an outlier when it comes to imagining the Nation. This was, for example, illustrated by the fact that it was only in 1996 that the State extended full adult franchise to FATA residents.⁶¹³

The Pakhtun people's liminality is further reinforced by the fixing of the Pakhtun body in space. This has been effectively achieved through a number of different strategies. For one, Pakhtun opportunities for mobility (social, political, and economic) have been marginalised by the State's designation of only English and Urdu as the *lingua franca* of Pakistan.⁶¹⁴ Other than demonstrating a reluctance to include Pakhtun culture and history within the national narrative,⁶¹⁵ this move has effectively sidelined Pakhtuns from participation in national politics, and has restricted their employability and opportunities for education.⁶¹⁶ If history is indeed intrinsically linked to language and communication,⁶¹⁷ then the claim of an undocumented precolonial history, coupled with restrictions on communication within the postcolony, suggests that the Pakhtun people's history both began and ended with the colonial encounter. While prior to colonisation the Pakhtuns were represented by a sea of shifting Empires (i.e. the

⁶¹¹ The liminality of the Frontier is made violently visible by Shane's comment that the North-West Frontier of Pakistan "is no any map, but it's where leaders of *Al Qaeda* and the Taliban both hide." See, Scott Shane, "The War in Pashtunistan," *The New York Times* (2009), <<http://www.nytimes.com/2009/12/06/weekinreview/06shane.html?>> (accessed: 30 December 2013).

⁶¹² In writing about the development of Asian frontiers during the period of decolonisation, Lamb notes that the frontier came to represent "a cell wall of the basic unit of national identity," symbolising a psychological divide just as much as a politico-legal boundary. See, A. Lamb, *Asian Frontiers: Studies in a Continuing Problem* (London: Pall Mall Press, 1964), p 8.

⁶¹³ Ian Talbot, *Pakistan, a Modern History, 3rd Edition* (London: Hurst & Co., 2009), p 3.

⁶¹⁴ Language can empowering because it not only "describes a pre-existing reality" but actually constitutes it; "it organises concepts, establishes relationships and networks, associations and disassociations. The language we use to apprehend the world around us is the residue of struggles of previous times; our vocabularies are crystallisations of specific historical confrontations and settlements." See, S. Sayyid, "Dis-Orienting Clusters of Civility," *Third World Quarterly* 32, no. 5 (2011): p 981.

⁶¹⁵ Indeed the English language has been tied to a flourishing of 'civilised' culture within India, giving rise to a "'cultivated class', often at the forefront of sophisticated political philosophies on the subcontinent." See, Akbar S. Ahmed, "Colonial Encounter on the North-West Frontier Province: Myth and Mystification," *Economic and Political Weekly* 14, no. 51 (1979): p 2092.

⁶¹⁶ Tariq Rahman, *The Urdu-English Controversy in Pakistan* (Cambridge Univ Press, 1997).

⁶¹⁷ Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* (Oxford: Oxford University Press, 1991), p 11-3. Also see, Sayyid's claims about the reality-constituting function of language, S. Sayyid, "Dis-Orienting Clusters of Civility," *Third World Quarterly* 32, no. 5 (2011): p 981-2.

Mughals, the Durranis) decolonisation signalled their (formal) incorporation into the body politic of the Pakistani State. In both instances there is no formal recognition of the contribution of their separate and distinct history independently of colonial representations. In the precolonial and postcolonial settings, Pakhtun identity is made invisible, and treated as an extension of identities more stable, more dynamic, more *political*.



Figure 4.3 – Colonial Map of British-India

(The Frontier is represented by the ‘unnamed’, yet clearly ‘possessed’ (see the map’s legend), grey and pale yellow areas). Retrieved from:

http://3.bp.blogspot.com/_ZZXSsLYde8U/TJluXtVzLxI/AAAAAAAAADgQ/WqbjEHLz0I0/s1600/british-india-map.jpg

Another way in which the Tribal Areas’ liminality is reinforced is by the fact that many of the State-initiated post-partition land reforms and agricultural policies have had the effect of widening power disparities between the settled and unsettled regions of the Province. In manipulating the Frontier-space through these policies, the State has exposed the Khyber-

Pakhtunkhwa Province to high rates of internal fragmentation. While the Province was said to have progressed more rapidly than any other Pakistani province in the years immediately following Partition, many of the large-scale irrigation, industrial, and educational projects were restricted to the settled areas of the Province.⁶¹⁸ Moreover, by relying on land-distribution processes based on European systems of land-ownership, the State dispossessed many plot-owners of their ancestral lands, and further exacerbated the already existing power-disparities between the settled and unsettled areas.⁶¹⁹

By directing our attention to the developmental successes of the entire Province, the State effectively obscures the plight of the unsettled Frontier agencies and diverts attention away from the fact that decolonisation has changed very little in terms of real political and economic opportunities for people living within the unsettled Tribal Areas. Furthermore, this data has the effect of presenting socio-economic imbalances as if they were a product of the environmental exigencies of the landscapes that these groups occupy. The fact that these groups have been, for centuries, contained and located within these 'inhospitable' environments as part of an expansive colonial strategy of political, social, and economic restructuring, is entirely concealed from us. As a result, the Frontier's fringe-status is reproduced within the national imaginary of the independent postcolonial State. This is achieved through policies which constrain politico-economic advancement within the Tribal Areas, and then present the lack of educational, ecological, technological, industrial, and infrastructural developments as evidence of the group's backwardness and revulsion of modernity.⁶²⁰

C. Analysing Pakhtun Autonomy: Testing the Limits of Multiculturalism

While the spatialisation of cultural difference has been a hallmark of Pakistani constitutionalism,⁶²¹ the presumption that cultural autonomy is best exercised through the process of compartmentalising normative systems through space is certainly not unique to Pakistani politics. In Chapter Three I highlighted a similar linking of space and social difference in Australia and Canada as well, and argued that we can trace these ideological and political processes for 'spacing' difference to the time of Europe's first encounters with foreign places and people. Consistent patterns of asserting power over people and things by controlling space

⁶¹⁸ Statistics on education can be found in the Imperial Gazetteer of India. See, *Imperial Gazetteer of India*, Provincial Series: North-West Frontier Province (Calcutta: Superintendent of Government Printing, 1908), p 74-5. As Ahmed notes, when Pakistan came into being the tribal agencies had only eight schools (primary, secondary, and high) in total. See, Akbar S. Ahmed, *Resistance & Control in Pakistan* (London: Routledge, 1991), p 99.

⁶¹⁹ James Spain, *The Pathan Borderlands* (The Hague: Mouton & Co., 1963), p 213-9. A new land resettlement system in 1947 opened up land ownership in the Tribal Areas to all Pakistani citizens whereas, in the past, the British had allowed the Pakhtun land distribution system to remain undisturbed.

⁶²⁰ Shuja Nawaz, *Fata--a Most Dangerous Place: Meeting the Challenge of Militancy and Terror in the Federally Administered Tribal Areas of Pakistan* (Center for Strategic & International Studies, 2009).

⁶²¹ Given that it is an ethnically-organised federation.

(through strategies to manage the anxiety provoked by cultural difference) has made it so that it is no longer possible to imagine concepts like political autonomy or independence, without simultaneously evoking space or territory. This is how we conventionally imagine the *worlding* of a society's law, the application of differing ideologies and institutions to peoples contained within a particular geographic location. The geographic fixing of political power and legal regulation is how societies conventionally imagine jurisdiction - a concept that represents our attempt to systematise, what are otherwise, proliferating and intersecting legalities.

One of the key chief challenges highlighted in Chapter Three and my study of Aboriginal rights in Australia and Canada was that claims for Aboriginal title obscured the fact that the major demand of Aboriginal groups revolved around the recognition of their coeval histories, identities, and social institutions. Indeed, the last section of that Chapter highlights how an acknowledgement of coevalness requires recognition of the mutual and active presence, simultaneous coexistence, and reciprocal influence of the normative arrangements of the Aboriginal and European peoples. This is precisely what native groups are seeking that the State acknowledge and enforce through its law and institutions.

However, Occidental Legality, and its processes of tethering territory to power, and geography to identity, has produced the view that exclusive access to geographic area equates to recognition and respect of one's cultural identity. Despite the Aborigines access to space under the Reservation system, it is possible to identify deep asymmetries in political and economic power between the dominant and Aboriginal communities. The Reserve-space represents a racialised, cultural space that may promote and even, on some level, preserve Aboriginal difference, but it does so by requiring Aboriginal peoples to affirm the stationary nature of their culture. In defining their identity, and containing their presence, the Aboriginal Reserve hardly represents a system of protection that treats Aboriginal peoples as the moral equivalents of their European masters. The recognition of Aboriginal rights and title is heavily circumscribed by a whole host of 'official' regulation and forms of law-making and law-enforcement that are entirely alien to the Aboriginal community.

In comparison, Pakistan's granting of autonomy to the Pakhtuns living in the Tribal Areas appears more consonant with the aims of liberal multiculturalism, and its recognition that culture is a crucial component of autonomous decision-making.⁶²² Tribal autonomy in Pakistan also sits well with the more radical variants of multiculturalism which claim that the liberal State must tolerate the *illiberal* practices of different cultures if it is to protect a thick conception

⁶²² W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, USA, 1996).

of cultural and legal pluralism.⁶²³ In limiting its legal jurisdiction, the State appears to be according the Tribal Areas' a right of juridico-political autonomy, allowing them to live in accordance with their customary law and practices without external interference. The Tribal Areas of Pakistan, therefore, are legal geographies that appear to be entirely neutralised of liberal law.

Yet, even in the absence of liberal law, the spaces of the Frontier have been racialised in ways that suggest a similar immobilisation of Pakhtun identity, body, and culture. For instance, while the constitutional provisions allude to a desire for higher unity, they do so while continuously drawing steep distinctions between ethnic groups that constitute the polity. Sometimes these distinctions take an evolutionary turn, where the modernity of the Nation is confirmed through the primitivity of its 'backward classes'. As my earlier discussion demonstrates the Frontier is, in one section of the Constitution, confirmed as part of the political community of the State, while in another section, it is clearly defined as separate from and incompatible with the nation-State. Sometimes these antithetical claims are made almost concurrently. There are instances when the official law has been indignant in its pronouncement of the Tribal Areas' inclusion within the political community of Pakistan, making its inhabitants eligible for the same rights and privileges as every other Pakistani citizen.⁶²⁴ In the same breath, however, these declarations are bracketed by a lack of interest in implementing legal procedures and political policies for an effective enforcement of those rights.⁶²⁵

The autonomy accorded to the Tribal Areas is a right granted to the 'space' rather than its people. The policies through which this has been achieved have had the effect of preventing the intermixing of Pakhtun culture, institutions, and bodies, with those of the Pakistani Nation. Autonomy is granted on the condition that the 'different' do not try to influence, shape, effect, or relate to the dominant group. Like Canada and Australia, Pakhtun rights of cultural autonomy do not follow the Pakhtun body out of the PATA or FATA. Pakhtuns are unable to avail themselves of their cultural institutions or the normative structure of the *Pakhtunwali* outside of the Tribal Areas.⁶²⁶

⁶²³ Chandran Kukathas, "Cultural Toleration," in *Ethnicity and Group Rights*, ed. Ian Shapiro and Will Kymlicka (New York: New York University Press, 1997).

⁶²⁴ *Manzoor Elahi Vs. Federation of Pakistan*, PLD 1976, S.C. 66, p 73. See the majority opinion of Salahudin Ahmad, J.

⁶²⁵ Ibid. See the majority opinion of Salahudin Ahmad, J.

⁶²⁶ While some Pakhtuns argue that *Pakhtunwali* is a 'way of life' rather than a specific legal system, the legal legitimacy of tribal *jirga* and decisions made by this form of dispute settlement are strictly prohibited in non-FATA areas of the State. This, for some, has been a cause for rejoice, given that the patriarchal structuring of the tribal *jirga* often means that the marginalisation of women and forms of resolution that have the effect of violating women's human rights. See, for example Mukhtar Mai's case and the use of *jirga* to settle matters of tribal honour outside of the FATA. See, Mukhtar Mai, *In the Name of Honour*, trans. Linda Coverdale (New York: Washington Square Press, 2007).

Moreover, the Pakhtun body, as I suggested earlier, has been immobilised by the State's unwillingness to incorporate the Pakhtun official language, *Pashto*, as a national language. This oversight is significant given that language rights are increasingly recognised as a precondition for the exercise of autonomy and citizenship.⁶²⁷ This unwillingness to accommodate Pakhtun culture and to implement more inclusive political and economic policies has severely limited the Pashtun people's opportunities for education and employment outside of the Tribal Areas. According to recent literature the residents of the Frontier have the highest levels of illiteracy in the country, and lowest levels of economic and population growth.⁶²⁸ Only three percent of Pakhtun women in the FATA are literate and only 12-15 percent of men compared to the national average of approximately 50 percent.⁶²⁹ Thus, it is hardly surprising that a number of studies point to the particularly vulnerable position of Pakhtun women living within the Tribal Areas.⁶³⁰ Free movement into and out of the Frontier has also been limited by the State's failure to support development projects within the Frontier-space, including a lack of interest in developing proper infrastructure in the form of roadways leading into and out of the Tribal Areas.⁶³¹

The Pakhtun's bodily integrity has been further compromised by the laxity with which the State has managed the recent American drone attacks within the FATA. While the Peshawar High Courts have condemned these attacks as a violation of international law and Pakistan's

⁶²⁷ Denise Réaume, "The Group Right to Linguistic Security: Whose Rights, What Duties," in *Group Rights*, ed. Judith Baker (Toronto: University of Toronto Press, 1994). Also see, Stephen May, "Uncommon Languages: The Challenges and Possibilities of Minority Language Rights," *Journal of Multilingual and Multicultural Development* 21, no. 5 (2000).

⁶²⁸ Between 1973 and 1981, the population of the FATA dropped dramatically by -12.6 percent while Punjab, Balochistan, and Sindh increased between 25 and 75 percent. Additionally, a 1981 census revealed that no percent of FATA residents were urban dwellers given the low levels of urban development in the Tribal Areas (compared with approximately 20 percent of Sindh and Punjab). Ian Talbot, *Pakistan, a Modern History, 3rd Edition* (London: Hurst & Co., 2009), p 32. While many Pakhtuns of the Tribal Areas migrated to Karachi (the most populous of Pakistani cities), there are claims which suggest that their migration has been connected with greater drug and crime problems in Karachi. In 1986 this culminated in "the bulldozing of the largely Pashtun/Afghan-inhabited north Karachi slum area of Sohrab Goth...in search of legal arms and drugs..." See, ———, *Pakistan, a Modern History, 3rd Edition* (London: Hurst & Co., 2009), p 45.

⁶²⁹ Ahmed Rashid, "The Situation in Pakistan," *Asian Affairs* 41, no. 3 (2010): p 372. Another draft report in 2003 has reported the Provincial average as 30 percent for men, and 17 percent overall (the average for women remains the same at 3 percent). See, Shuja Nawaz, "Fata - a Most Dangerous Place: Meeting the Challenge of Militancy and Terror in the Federally Administered Tribal Areas of Pakistan," *Center for Strategic and International Studies* (2009), http://wikileaks.org/gifiles/attach/15/15557_081218_nawaz_fata_web.pdf.

⁶³⁰ Arab Naz et al., "State of Women's Empowerment and Community Perception in Rural Pakistan (a Case Study of Malakand Division)," *Asian Journal of Empirical Research* 3, no. 3 (n.d.). Also see, ———, "The Dormancy of Empowerment: An Analytical Study of Various Impediments to Women's Education in Khyber Pakhtunkhwa Province of Pakistan," *Available at SSRN 2082988* (2012).

⁶³¹ Imtiaz Sahibzada, Adviser to the Prime Minister on Tribal Areas, *Federally Administered Tribal Areas (Strengthening and Rationalisation of Administration Draft Report 2006*, Islamabad p 63-65. The Khyber Pakhtunkhwa (0.13) and FATA (0.17) have almost half as many roads per square km as compared to Pakistan (0.26) Also see, Shuja Nawaz, "Fata - a Most Dangerous Place: Meeting the Challenge of Militancy and Terror in the Federally Administered Tribal Areas of Pakistan," *Center for Strategic and International Studies* (2009), http://wikileaks.org/gifiles/attach/15/15557_081218_nawaz_fata_web.pdf. Nawaz notes that "[n]ewly constructed roads may be laid in directions that accord with particular economic interests, rather than for the public good of entire villages, as political agents, surveyors, and contractors are paid off or intimidated into compliance."

territorial sovereignty,⁶³² they have sought to do so by further distancing the State from the Tribal Areas. Over the course of the High Court's judgment the residents of the North and South Waziristan Agencies of the FATA were referred to as "Pakistani *Nations* of North and South Waziristan." While the statement appears to acknowledge cultural heterogeneity, it spatialises tribal identity in such a way that the victims of these attacks appear as a distinct social group separate from the State and its national body. The court's racialisation of the Pakhtun body is further supported by its claim that the drone attacks were to be considered akin to *genocide*. Directly quoting the Geneva Convention, the Court contended that the drone strikes were "[a]cts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group;"⁶³³ In speaking on behalf of the Pakhtun communities of the Tribal Areas the Court was confirming their status as citizens, but citizens of a different nature, of a separate *kind*. An emphasis on Pakhtun social difference was 'front and centre' in the Court's judgment of the filed petition.

While the recognition of the Pakhtun community as a Nation may be welcomed by members of the group, the State's construction of the drone attacks as an issue of social genocide absolves the State of all accountability for geographically locating and fixing the Pakhtun community within that region. The State is, essentially, failing to acknowledge the reality that the Tribal Areas *fall within their jurisdiction*, eschewing the possibility of jurisdictional overlap, normative interpenetration. The Courts seem more intent on reiterating the cultural distinctiveness and jurisdictional division between the Nation and its tribal people. In so doing the institutions of the State displace the plaintiff's attempts to hold the State responsible for failing to exercise its sovereignty over an issue that has dire implications for many of its citizens.

In the direct aftermaths of the attacks, the Prime Minister's Office released a statement criticising the attacks in the North Waziristan Agency of the FATA, claiming that "such attacks will bode very negatively on our joint [Pakistan and US] efforts to eliminate the menace of terrorism in this region."⁶³⁴ The President's declaration suggests that he perceives himself as an ally of the 'West', against the fundamentalism and traditionalism of the 'East'. This, as I discuss in Section (4) of this chapter, poses some very interesting challenges for how we rethink the

⁶³² The case was brought by a resident of the North Waziristan against the Pakistani State, demanding that the State exercise its sovereign right to prohibit these attacks and to provide some sort of monetary compensation for victims. See, *Malik Noor Khan Vs. Federation of Pakistan through Governor Khyber Pakhtunkhwa & 5 Others*, (W.P. No. 1551-P/2012)(2013).

⁶³³ *Ibid.*, Section 13(a), p 11-2.

⁶³⁴ Press Information Department, "Pr No. 172 Press Release: Prime Minister Syed Yusuf Raza Gilani Strongly Condemns Drone Attack in Datta Khel," 2011.

Orientalist tropes that have, for quite some time, structured our understanding of culture, history, and questions of modernity.

i. Fragmentary Solutions for Cultural Diversity

While the exercise of Occidental Legality has produced a situation in which the Pakhtun communities of the Tribal Areas may indeed have 'space' for the exercise of cultural autonomy and the operation of their own normative structures and institutions without State encroachment, the above noted issues of economic inequality and political disempowerment have been largely obscured by the use of this 'space as autonomy' model of colonial (and now postcolonial) governance. To claim that respect for cultural diversity rests on the use geographic space as a way of *containing* different cultural and racial groups, appears to contradict the very essence of pluralist ideology. An appreciation of diversity seems entirely misplaced in a world ordered through the implementation of cultural cleavages and racial dichotomies, where different groups are given their 'own space' to live and act away from the spaces of others.⁶³⁵ In establishing forms of governance by implementing legal geographies which impede cultural and racial interpenetration, States are effectively negating the very basis for pursuing pluralist policies in the first place. Though this piecemeal arrangement gives the impression that societies are "liv[ing] together in harmonious relations and all the people fully realise their privileges as citizens of the modern world,"⁶³⁶ these already fragile relations are cast into disorder and perpetuate violence at the first sight of hybridity, of intermixing, of 'black and white bodies, touching one another.' In Chapter Three I discussed how this intermixing is managed through, for example, biodiversity discourse and the implementation of 'protected areas' of national parkland. Ecological protection policies empty certain spaces of their human content so that they can act as a sort of barrier or buffer between the dominant population and the racialised Other.

These perspectives on social pluralism as the presence of a co-existing medley of people - living 'side-by-side' yet separately - has been criticised by a number of contemporary pluralists for two key reasons. First, some of these commentators argue that such a view focuses too heavily

⁶³⁵ Which appears consonant with Furnivall's pioneering study of economic pluralism within the colonial Far East observes a society incorporating a "medley of people", with "different sections of the community living side-by-side, but separately within the same political unit." See, John Sydenham Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (CUP Archive, 1948), p xv. Furnivall draws on tropicality discourse to marginalise and subordinate the Burmese in comparison to their European colonisers. Thus, one could argue, his view of plural society is one underwritten by claims of racial hierarchy and European cultural superiority. See, ———, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (CUP Archive, 1948), p xv-xvi.

⁶³⁶ John Sydenham Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (CUP Archive, 1948), p xvi.

on forms of social difference, rather than focusing on the aims and features that unite members of contemporary society.⁶³⁷ Others claim that this fragmentary vision of pluralism produces essentialist definitions of race and culture that place very little value on the potential of human agency, the possibility of intercommunication and mutual-influence, and also minimises intersectional forms of inequality.⁶³⁸ As a result social scientists end up producing fixed and unyielding conceptions of culture and cultural identity which then inform law and politics in very problematic ways. I discussed some of these in my earlier discussion of Aboriginal title jurisprudence in Chapter Three. According to both critiques the aim of pursuing forms of cultural protection and the recognition of normative diversity goes beyond mere tolerance or accommodation of cultural difference. This has led many theorists to argue in favour of dialogical processes for protecting plurality.⁶³⁹ I assess these methods of protecting and promoting pluralism in Chapter Five, and discuss their potential for deracialising the Tribal and Aboriginal places of confinement within Canada and Australia, along with Pakistan.

ii. *Places of Legal Excess*

Living in a single political unit and under one overarching legal system would certainly limit the Pakhtun peoples' exercise of self-government. However, this does not mean that the Tribal Areas, in the way that they have been legally constructed, are entirely neutralised of State regulation. For all the claims about the 'lawlessness' that prevails within the Tribal Areas,⁶⁴⁰ the Frontier is the *most regulated* of all the spaces comprising the territory of Pakistan; it is a space subject to, not a *lack* of law, but an *overabundance* of law. The work of law, as such, is most invisible at the exact location of its greatest omnipresence. Colonial, customary, State, and Islamic Law, formally and informally, intersect within the Frontier-space. The *jirga* enforce

⁶³⁷ A charge often levied against multiculturalists. See, Evelyn I Légaré, "Canadian Multiculturalism and Aboriginal People: Negotiating a Place in the Nation," *Identities Global Studies in Culture and Power* 1, no. 4 (1995).

⁶³⁸ Ali Rattansi, "The Time-Spaces and Subject-Objects of the Raced-Body," in *Racialisation: Studies in Theory and Practice*, ed. Karim Murji and John Solomos (Oxford, UK: Oxford University Press, 2005). Also see, Paul Gilroy, *Against Race: Imagining Political Culture Beyond the Color Line* (U.S.A: Harvard University Press, 2000). This is also a charge levied by postcolonial writers like Bhabha and Spivak, who reject 'foundational' narratives (gender, class, capitalism) and are more interested in creating dynamic, shifting, and overlapping subjectivities based on localised relationships rather than notions of a universalised categories like nation or race. See, Homi Bhabha, "The Other Question...Homi K. Bhabha Reconsiders the Stereotype and Colonial Discourse," in *Black British Cultural Studies: A Reader*, ed. Houston A. Baker, Manthia Diawara, and Ruth H. Lindeborg (Chicago: University of Chicago Press). Also see, Gayatri Spivak, "Can the Subaltern Speak?," in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (London: MacMillan, 1988).

⁶³⁹ In Tully's case it is a dialogical model of constitutionalism See, J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge Univ Pr, 1995). For Taylor, it is a recognition of the dialogical process of identity-making. See, Charles Taylor, *Politics of Recognition*, ed. Amy Guttmann, Susan Wolf, and Michael Walzer (Princeton: Princeton University Press, 1992). For Madood and Meer it is the pursuit of *intercultural* dialogue to produce and given voice to cultural hybridity. See, Nasar Meer and Tariq Modood, "How Does Interculturalism Contrast with Multiculturalism," *Intercultural Studies* 33, no. 2 (2011).

⁶⁴⁰ Lal Baha, *N.W.F.P Administration under British Rule 1901-1919* (Islamabad (Pakistan): National Commission on Historical and Cultural Research, 1978), p 4. Also see, Sarfraz Khan, "Special Status of Tribal Areas (Fata): Illegal Becoming Licit," *Central Asia* 63(2008).

both the *Pakhtunwali* and *Shariat* law, State officials administer the FCR, and the Federal *Shariat* Court supervises the implementation of the *Hudood Ordinances*.⁶⁴¹ In addition, the newly amended FCR has now permitted the establishment of a second judicial body, the FATA Tribunal, to oversee the judgments of the Political Agent and the Deputy Commissioner. Amendments have also been made to allow for a *Quami Jirga* made up of tribal elders who are able to adjudicate over FCR offences. The Superior and High Courts have even overridden s.247(7) of the Constitution - which restricts the Courts' jurisdiction over the Frontier-space - hinting at the Court's future potential to develop law within the Frontier. This interpenetrating matrix of normative systems, particularly within the realm of criminal law, has had the effect of making over-regulation invisible in its ubiquity. The Pakhtun space becomes *lawless* not because it is unregulated and ungoverned, but because it is exposed to numerous systems in parallel so that the work of each is rendered unrecognisable to itself.

By alleging a scarcity of legal regulation within the tribal regions, the State has been able to mask its use of a more stringent set of controls over, and surveillance within, the area. The extent of the State's power, and certainly the extent of the asymmetry of power that characterises the Pakhtun-State relationship, is reflected quite prominently within the clause of the 1973 Constitution that authorises the President to order that "the whole or any part of a Tribal Area...cease to be Tribal Area."⁶⁴² If the space that the Pakhtuns occupy is an essential component of the unique identity that they possess then, in entitling the President to revoke the tribal status of the Frontier, the Constitution appears to empower an external entity the right to renege on not only the cultural autonomy of the Frontier Pakhtuns, but to deny their cultural identity as a whole.

iii. *Space for Opposition*

While Pakistan incorporates a very different liberal approach to minority protection, one of its most problematic effects is that it leaves no room for cultural engagement or the expression of opposition. It is certain that, in incorporating the very principles and doctrines that were historically used to subjugate and dispossess native populations, State law is engaging in a form of cultural domination. Yet, to prohibit the extension of a legal framework to peoples/individuals on the basis of its compromised and convoluted history is to largely foreclose that group's opportunity to engage with and, perhaps, transform that framework. Undoubtedly, liberal law has a very complicated, and not always equitable and inclusive history.

⁶⁴¹ Legal framework established for the adjudication of offences under Islamic Law. Include four offences: those against property, the offence of adultery, rape, and fornication (*zina*), the offence of false accusations of *zina*, and the offence of failing to obey the prohibition on alcohol (*hadd*). See,

⁶⁴² 1973, "The Constitution of the Islamic Republic of Pakistan," Section 247(6).

Despite this, however, it has provided some opportunity for redress and compensation, and has further entrenched forms of minority protection.⁶⁴³

In Canada and Australia, some Aborigines have found access to the official law and domestic courts empowering.⁶⁴⁴ To the extent that these interactions produce transformations in the law, provide forms of monetary and political redress, and work to dismantle pre-existing conceptions of Aboriginal cultural inferiority or 'backwardness', the opportunity for engagement that legal discourse and processes provide cannot be entirely dismissed. This, however, is an opportunity that remains largely unavailable to the Pakhtun communities of Pakistan living in the Tribal Areas.

If we are to understand recognition and celebration of diversity as the basis for a more inclusive political order, then there needs to be space and opportunity for the expression of diversity in the language and voice of the subaltern her-/himself. I agree that liberal law often hems in that voice, forcing the subaltern to articulate and express their sense of self using the language and actions most intelligible to liberal law and its attendant institutions. However, in a society structured by defined boundaries between law and politics, where the official law of the State is often hailed as the 'only law' and recognised as one of the most legitimate forms of regulation and emancipation, there is much to be said about having a voice within this 'official discourse'. Thus, while much of this thesis has been devoted to critiquing this official discourse, pointing to the numerous instances in which it collapses subjective experience with objective knowledge, and gives rise to forms of cultural domination and differential treatment, an engagement with this discourse is, I argue, nonetheless important if only to draw attention to and in some way trigger the possibility of transforming, its most oppressive tendencies. I will explore this issue further in Chapter Five to suggest that coeval recognition is best achieved from dialogue between minority and official discourses.

⁶⁴³ For example, the ability to seek redress and compensation for past wrongs such as the gross misconduct and physical and sexual violence that took place in residential school system. *See*, Shauna Troniak, "Addressing the Legacy of Residential Schools," ed. Federal Government of Canada (Ottawa: Library of Parliament Research Publications, 2011). *Also see*, National Aboriginal Law and the National Alternative Dispute Resolution Sections of the Canadian Bar Association, "The Next Logical Step: Reconciliation Payments for All Indian Residential School Survivors," (2005), <<http://www.cba.org/CBA/Sections/pdf/residential.pdf>> (Date Accessed: 2 January 2014). This has become important for the more vulnerable members of minority communities (i.e. women and children). *See*, Katrina Harry, "The Indian Act & Aboriginal Women's Empowerment: What Front Line Workers Need to Know," (2009), <<http://www.bwss.org/wp-content/uploads/2010/06/theindianactaboriginalwomens empowerment.pdf>> (Date Accessed: 27 December 2013).

⁶⁴⁴ For many *Delgamuukw* presented a victory for Aboriginal groups in terms of the courts reliance on Aboriginal oral history for evidence of Aboriginal prior occupation of Crown lands. Some Aboriginal groups perceive the courts' decision in *Delgamuukw* as a major victory for Aboriginal groups in terms of the State's recognition of their rights to and on their land. *See*, Satsan (Herb George), "Delgamuukw: Ten Years Later (Celebrating the *Delgamuukw/Gidsay'wa* Decision)," (2007), <http://fngovernance.org/news/news_article/delgamuukw_ten_years_later> (Date Accessed: 26 December 2013).

5. Pakistan and the Dislocation of 'the Orient'

Before moving on to the next chapter, it is worth emphasising that this particular case study disrupts the prevailing view that the globe can naturally be divided into two internally-coherent and separate hemispheres. Connected to this view is the idea that these two separate hemispheres, the East and the West, the Orient and the Occident, embody a specific and timeless set of characteristics, values, aims, and ideologies. Cultural domination and oppression has almost always been conceptualised as a West/East problem, where the former is often understood as the 'dominating' and the latter as the 'oppressed'. How does Pakistan's exercise of cultural domination, in the form of its political and legal structures of governance rattle this enduring conception? More importantly, how does the continued prominence of Occidental Legality - the spatialising impulse of colonialism integrated into the (now postcolonial) political and legal structures of governance – complicate our pre-existing notions of Orientalism and Occidentalism? Pakistan's use of a spatio-legal outlook throws Occidental Legality into disarray precisely because Pakistan (as a non-settler State) epitomises that very entity that has inspired processes for spatialising power in the first place: the hybrid.

While the Imperial power has physically retreated from the territory of Pakistan, what is left in the wake of this departure are a set of institutions and structures which are linked to the geographic space and its people by a brutal and oppressive history. Pakistan's legal and political structures of governance emerge from a history of racial and ethnic discrimination and subordination. The violence with which Partition took place and the fact that political interests are still heavily influenced by ethnopolitics,⁶⁴⁵ points to the fact that these structures continue to 'speak the language' of the colonisers. This disorientation of identity, the mixing of the Orient and Occident to produce a 'hybrid', is a reality that has plagued the State as much as it has the Pakhtun community.

The miscegenation of identities, the production of ways being that are 'in-between', is a reality that complicates the traditional view of the 'post'-colonial representing a historical rupture. Indeed, the intellectual and discursive processes of colonialism did not cease at the moment of decolonisation and emancipation. "Such societies", as Sökefeld claims, "continue to remain under the 'gravity'...of colonial history."⁶⁴⁶ Through both Chapter Three and Four I reveal the ways in which Occidental Legality stubbornly and problematically persists in both settings, creating cultural difference and racial and legal hierarchies. As the FATA example demonstrates,

⁶⁴⁵ Whereby ethnicities have been spatialised through the formation of ethnically-homogeneous provincial units.

⁶⁴⁶ Martin Sökefeld, "From Colonial to Postcolonial Colonialism: Changing Modes of Domination in the Northern Areas of Pakistan," *The Journal of Asia Studies* 64, no. 4 (2005): p 939.

the postcolonial situation is indeed unique, for it points not only to the dislocation of identity, but an appropriation of aspects of the colonial mentality by the very groups that were once its subjects. Whether these emerge as a product of native empowerment, or a mere 'mimicry' of European ideology and thus a source of further subjugation, is an area that deserves further exploration, beyond the confines of this particular thesis.

While the history of the Frontier suggests that it was constructed as a means to *create distance* between the colonial Self (British India), and its perceived Other (Russia), the inclusion of the Frontier into the State-space of Pakistan has had the effect of *compressing* the referential distance between the new colonial self (Pakistan) and one of its perceived Others (Pakhtuns). As the new criteria for membership in the political community is to be domiciled within the State's territory, previously isolated and adversarial social groups now find themselves as 'part of the same side'. At once a traditional and archaic zone of cultural and legal autonomy, as well as a constituting territorial unit of the modern nation-State, the Frontier is both primitive *and* modern. It is in society's inability to come to terms with this difficulty in 'locating' the Frontier – what Perrin refers to as the "splitting and doubling that the nation exhibits"⁶⁴⁷ - that we can identify an anxiety which dislocates the Pakhtun in its aim to "place" the tribal space.

The State appears to continuously define its own modernity against the immodernity of the tribal space, by simultaneously eschewing forms of tribal law (i.e. the FCR) as incompatible with modern liberal principles, yet failing to officially invalidate it.⁶⁴⁸ This suggests two things. First, by using liberal law's principles to vitiate forms of tribal regulation, the Court appears to be recognising the nation's transition from its primitive colonial past to a modern liberal present. Yet, by failing to revoke the application of the contravening law they are simultaneously acknowledging the Tribal Areas' temporal immobility. In so doing they give the impression that the FCR, as a barbaric primitive instrument, is well-suited to the barbaric primitive ways of the Frontier. Though the legal validity of the FCR is denied, this sort of *blind compliance* with the Constitution suggests that it is 'colonial law', and not its advocates, that are doing the controlling.

This 'legal nonsense', by which I mean its contradictory claims, may in fact, symbolise the law's "recognition of an anxious contradictory place between the human and non-human, between

⁶⁴⁷ Colin Perrin, "Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous People," *Law and Critique* 6, no. 1 (1995): p 57.

⁶⁴⁸ See, *Manzoor Elahi Vs. Federation of Pakistan*, PLD 1976, S.C. 66. where the court disavowed the FCR as 'law' under the rule of law principles espoused in Art.4 and Art.9 of the Constitution, while, at the same time, upheld its application under the existing-law principles of Art. 26. Where the courts. Article 268 calls for the application of colonial law until appropriate amendments are made by the legislature.

sense and nonsense.”⁶⁴⁹ This, Bhabha notes, is the ‘enunciatory disorder of the colonial present’, where a once clearly-defined Orient begins to speak the language of the Occident.

Once, itself the object of difference, Pakistan may thus be experiencing a dual anxiety – one of constructing some sort of cultural difference (of the Pakhtun versus other Pakistanis) against which to define itself as an extension of European modernity,⁶⁵⁰ at the same time as experiencing an anxiety in using the language of Empire (in the form of liberal law) to give voice to that difference. In the process of doing so, the emergent Nation itself recognises its hybridity, “a colonial otherness which can neither be established nor disestablished.”⁶⁵¹ The colonial present therefore, represents “the persistence of a present which, by rights, ought to have passed...an insistence of the past in the present,”⁶⁵² a place of uncertainty between the self and the Other, of broken and reconfigured identities, of identities in-between. Accordingly, as Perrin notes, in the “failure of distance and in the anxiety of proximity, coherence and consistency are undermined rather than underlined.”⁶⁵³

The case study of Pakistan as a postcolonial independent nation-State, suggests an unsettling of the Orient/Occident divide. It highlights not only the tenuousness of this dichotomy, but draws attention to the presence of ambivalence. This case study reveals to us the power of Occidental Legality as a hegemonic discourse that is readily acceptable and adaptable to societies regardless of their cultural, normative, or historical particularities or even their status as an independent national State that has freed itself from colonial rule and its ordering of space. The coalescence of law and geography, the production of the spatio-legal, has become thoroughly cemented within the social imaginary. So much so that contemporary societies cannot fathom questions about legal jurisdiction, sovereignty, autonomy, and governance without simultaneously invoking and explaining those concepts by reference to geographies that display the features of being owned, enclosed, and culturally-divisible. Territory has become the preeminent form by which contemporary societies order and regulate social relations between themselves and their perceived Others.

⁶⁴⁹ Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994), p 178.

⁶⁵⁰ We find evidence of this in a variety of cases that draw on European philosophies within which to ground contemporary Pakistani judgments. See, T. K. K. Iyer, “Constitutional Law in Pakistan: Kelsen in the Courts,” *The American Journal of Comparative Law* 21, no. 4 (1973).

⁶⁵¹ Colin Perrin, “Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous People,” *Law and Critique* 6, no. 1 (1995): p 56.

⁶⁵² Ibid.

⁶⁵³ Ibid.

6. Conclusion

In this chapter I draw on the case study of Pakistan for two reasons. First, it is to provide a clear example of the reciprocal relationship between space and identity. The Tribal Areas have been interpreted in a particular way so as to meet the purposes of Pakhtun identity-construction. The landscape and geography of this area naturalised the external development of a bestial and heady Pakhtun identity. I examine the legal and political history of the Tribal Areas of Pakistan from the time of colonial India to the present-day Pakistani State, and suggest that the cultural identity of the Pakhtun has been shaped through the challenging and turbulent landscape of the space that they occupy. Suggesting that this fusion between identity and topography has been incorporated into the current model of legal and political governance, I show how space continues to play a leading role in the marginalisation of Pakhtun identity and distancing of the tribal body from the rest of the Nation.

The second reason this case study was used, was to study a form of liberal autonomy that appears to 'go further' than the rights of self-government that have been accorded to the Canadian and Australian Aborigines by their respective governments. Yet, in studying the situation in Pakistan, it is clearly evident that the State's protection of Pakhtun autonomy, as it was granted by the colonial governments in India, has failed to translate into the genuine economic and political empowerment of Pakistan's tribal community. The postcolonial situation in Pakistan, including the way in which State-tribal relations are structured, can be read as an extension of colonial governance. In both instances the governing entity's relationship with the tribal community is one based on paternalism and ordered through a focus on law and order, rather than a protection of rights and an acknowledgement of the tribal peoples as political equals. The FATA's liminality has been cemented within postcolonial law by the fact that intercommunication between the normative system of the tribal peoples and the State has been entirely foreclosed by the State's failure to extend its institutions into the FATA and to make available its protections to the people residing there. The Pakhtun community of the Tribal Areas have been socially marginalised and remain politically and economically underdeveloped. This raises many questions about the State's intention to use territorial autonomy as a form of minority protection as it relates to the Tribal Areas.

It is largely believed that in according the FATA territorial autonomy the State has permitted them the right to live in accordance with their normative systems and structures, free from State intervention. However, I examine how, through an engineering of the Frontier as a "hostile

landscape”⁶⁵⁴, a *lawless* place, Pakistan has continued the colonial legacy of endorsing a heavily circumscribed form of tribal autonomy all the while subjecting the Frontier-space to *legal excess*. It is clear that the Tribal Areas are *not* a place lacking law but a place experiencing an overabundance of legal regulation, where *several* coexisting systems of normative ordering are involved in the co-management of everyday-life. As a place of legal excess often understood as ‘lawless’, the Tribal Areas possess a fractured identity. This fracture is mirrored by the State, and expressed through the law in the form of ‘legal nonsense’ which erupts when the courts aim to affirm the State’s moral existence as a ‘modern’ entity. This framing of the State, however, is challenged by the presence of subaltern groups and colonial processes that bring the State face-to-face with its own alterity.

The processes of Occidental Legality, expressed through the spatialisation of social difference, divert our attention away from the issues that lie at the heart of minority demands for cultural autonomy. Contemporary claims for territorial autonomy by minority communities follow a long historical process, and ground themselves in and through frameworks of knowledge, that confirm that space and particularly ownership over space (i.e. territory and property relations), equates to power and, more importantly, equates to a recognition of a community’s *humanity*. It is this connection between spatial ownership and a confirmation of one’s humanity that should be the primary focus of legal critique when managing issues of cultural pluralism. Yet, in Chapters Three and Four, I demonstrate how contemporary legal discourse evades this issue, instead opting to confirm this problematic relationship through a focus on territorialising cultural (and legal) autonomy.

Despite this, however, I suggest that liberal law has an equal potential to be both emancipatory and regulatory in this respect. While much of this thesis has focused on its regulatory aspects, with significant modification, including a focus on the idea of *coeval recognition*, the emancipatory potential of liberal law can be maximised. I also make the claim that this space for dialogue and the potential to express opposition and resistance is largely foreclosed in the Pakistani example because of the State’s unwillingness to extend the liberal law and its attendant institutions of negotiation and dialogue (i.e. its Constitution and courts). In grounding autonomy in territory, liberal law suggests that an exclusive access to land is an end in itself, rather than a *means to an end*; the end, in this sense being, an appeal for dominant elites to recognise the equal moral worth of historically marginalised groups. I develop this conceptual framework further in Chapter Five, where I consider the opening up of liberal institutions and

⁶⁵⁴ A space whose “encompassing scale of [rebellion] appears to thwart attempts to manage [it] securely.” See, Michael Shapiro, *Violent Cartographies: Mapping Cultures of War* (Minneapolis: University of Minnesota Press, 2008), p 18.

law to better represent subaltern voices and diverse historical and cultural perspectives through the notion of coeval recognition.

Chapter Five

Coeval Recognition of Plurality

Operationalising the Emancipatory Potential of Liberal Law

1. Introduction

Through the analysis undertaken over the course of the last four chapters, I have revealed how territory is a cultural artefact, produced through European signs, symbols, and narratives, and reproduced through the common law implemented in Britain's overseas colonies. In Chapter Two I critically analyse how the first images of territory as an owned, bounded, and culturally divisible view of space was produced through the technologies of cartography, ethnography, and travel writing. I explain how social difference was envisioned through the discourses of tropicity and the pristine wilderness, and how both served to legitimate the colonial encounter and the subsequent dispossession and oppression of native peoples. In Chapter Three I expose how these views were further reproduced through legal enactments within colonial India, Australia and Canada. In particular I expose how the bounded, owned, and culturally-divisible conceptualisation of space that emerged during the first Imperial-Indigenous encounters was encoded through legal doctrines like *terra nullius*, the doctrine of discovery, and Vitoria's notion of *jus gentium* and the right of sojourn.

Drawing a comparison between the territorial conception of space that emerged during the colonial period, and the cultural geographies that are produced in contemporary liberal societies that have the aim of protecting the cultural autonomy of minorities, I argue that both are representations of jurisdictional struggles between distinct normative communities. I further evaluate how these conceptions of space conflict with subaltern perspectives, namely Aboriginal peoples' understanding of land and geography. Through this comparison I reveal how land and geography have been employed to not only naturalise native dispossession, but also help to conceal what lies at the core of native quests for autonomy. The central issue that is at stake in these struggles is not merely the retransfer of and/or jurisdiction over territory, but how the State's "culturally exclusive vision of geography" has denied indigenous "knowledge and experience...[from] contribut[ing] to the formulation of institutions and ideas to better live

with our environment.”⁶⁵⁵ Demands for autonomy are, according to Aboriginal peoples, synonymous with demands for recognition of their status as sovereign, self-governing nations.

In the analysis that I undertook in Section (5) of Chapter Three, I demonstrated that the political aspirations of Aboriginal peoples cannot merely be equated with greater property rights over their ancestral land. Certainly that is part of the solution, but a precondition of that is that the State recognises them as coeval partners, as morally equivalent *nations*. Instead, what appears to be happening within liberal societies with Aboriginal national minorities, like Australia and Canada, is that legal recognition of Aboriginal rights of autonomy and self-determination are offered up on the terms of Occidental Legality. Spatial possession, environmental development, appropriate land-usage, permanent settlement, land as property, biodiversity protection – the vernacular of ‘territory’ – space as bounded, possessed, and culturally divisible – has become the primary analytic through which the political rights of Aboriginal peoples are validated or denied. The intense focus on territory minimises the fact that Aboriginal peoples’ claims are not about their prior occupation of land and the legal rights that flow from that, but about acknowledging the fact that before the arrival of Europeans, the Aboriginal peoples possessed, unique and complete political and legal institutions, doctrines, and forms of organisation. In essence, what they are challenging is the very idea that the Imperial-Indigenous encounter brought with it forms of organisation and systems of ordering to indigenous groups. For States like Canada and Australia it is this claim to civilisation that primarily legitimises their legal and political authority over the Aboriginal peoples. To suggest, as Borrows and Chartrand have, that these communities possessed highly advanced, comprehensive, and dynamic legal and political systems prior to contact, therefore, is to challenge the basis upon which their political subjugation and legal control has been legitimised for centuries.

I use these ideas in another context in Chapter Four, where I analyse the colonial construction of the Tribal Areas of Pakistan and the colonial formulation of Pakhtun identity through references to their natural environment. I demonstrate how these images of the Pakhtun tribesmen were further encoded through legal instruments like the Frontier Crimes Regulation, and how they continue to have significance for the people of the Tribal Areas today. I use the case study of Pakistan to argue that the aim of liberal law should not be the creation of cultural geographies distinguished by the replacement of State law with native custom. Instead, liberal societies should opt to focus on adopting strategies of co-operation and co-regulation. From my analysis in Chapters Three and Four it is clear that geography and the environment have played an

⁶⁵⁵ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2007), p 31.

important role in not only setting jurisdictional boundaries as they pertain to legal authority, but have also advanced the limits of political subjectivity – differentiating between who we consider human (and thus the subjects of modern legal jurisdiction) and inhuman (the subjects of ‘tribal’ or ‘cultural’ jurisdiction).

Demands for cultural autonomy in liberal States like Canada and Australia have been managed through the concept of legal recognition. As it stands, the relationship between territory and the recognition of native peoples’ rights has been wrongly conceived. Currently, it is believed that Aboriginal peoples’ demands for access to and jurisdiction over territory are appropriately managed through the idea of legal recognition. Recognition is perceived as the approach through which political rights are sought. In this Chapter I argue that the relationship is actually the inverse. Demands for recognition need to be seen as struggles in their own right – not for land, nor territory, nor special political rights, nor an affirmation of political and legal difference. Struggles for recognition are, partly, an acknowledgement of the fact that the language, institutions, ideologies, and doctrines of the dominant political and legal systems are not only ill-equipped, but do not have the requisite authority to shape the everyday lived realities of those seeking recognition. This is an idea that James Tully has touched on quite extensively in his book *Strange Multiplicity*. But, apart from this, contemporary struggles for recognition, particularly as they involve colonised peoples, are also demands for the recognition of hybridity, of miscegenation, of identities in-between. They are demands that the State recognise the intermixing between cultures. They represent calls for an awareness of the absolute impossibility of maintaining some sort of ‘cultural purity’ or distinctness, upon which much of the litigation related to legal recognition of Aboriginal rights relies. The ‘stamp’ of Aboriginality upon liberal law has been discussed in length by Borrows’ in *Recovering Canada*, when he considers the many ways in which the Aboriginal-colonial relationship was characterised by mutuality, diversity, and a reciprocal respect for the sovereign and equal status of one another.⁶⁵⁶ From a slightly different perspective, liberal law’s incorporation of Aboriginal perspectives has also been hinted at by Chartrand and Monture-Angus, both of whom express anxiety over their fractured identities as Aboriginal legal practitioners and their involvement in upholding a legal tradition that has, historically, worked to subjugate their people. For Monture-Angus, as I explained in Chapter Three, this unease has produced a need to retreat into the Aboriginal Reserve as a way of reconnecting with her cultural identity.⁶⁵⁷ Their situation brings to the forefront one of the most unfortunate consequences of the Imperial-Indigenous encounter, which is the inability, even today, for once-colonised peoples to reconcile their

⁶⁵⁶ Ibid., p 126-8.

⁶⁵⁷ See my discussion in Chapter Three, p 172.

cultural and citizenship identities. The problem, as I argue throughout this thesis, is that the Imperial-Indigenous encounters were defined by polarised identities and strict cultural dichotomies – settler/native, primitive/civilised, brutal/peaceful, European/native. The effects of this oppositional discourse continue to have tremendous implications for colonised peoples even today.

In this Chapter I put forth the theory of coeval recognition as an alternative theory of recognition that addresses some of the more significant weaknesses of the prevailing models of mutual and legal recognition. My theory of coeval recognition draws on the work of Charles Taylor and James Tully, but makes a crucial modification by suggesting that recognition, as it relates to colonised peoples, must be sensitive and open to respecting and acknowledging hybrid identities. Recognition cannot simply be thought of as a reciprocal acknowledgement of cultural difference, distinctness, and the presence of unique forms of political and legal organisation. It must be understood as a reciprocal affirmation of active coexistence, normative interpenetration, and legal and political intermixing.

To be clear, I *do* believe that liberal law does have the potential to support forms of coeval recognition, and can reasonably do so without recognising cultural difference and segregating different normative communities to separate and divided spaces. Certainly Chartrand's and Borrows' work, as discussed in Chapter Three, points to the fact that liberal law is sourced from diverse perspectives already, though it often does not seem to acknowledge this. Tully's work on pluralistic constitutionalism, which I discuss later in this Chapter, also expresses optimism in relation to liberal law's potential for incorporating a range of voices and worldviews. In each of these instances, from the perspectives of both those working within the dominant liberal tradition and those that appear to straddle the State-/Indigenous-law divide, liberal law is perceived as having an emancipatory potential. The aim, therefore, is to reveal how its capacity for emancipation may be better realised by traditionally marginalised groups.

2. The Emancipatory and Regulatory Function of Law

In jurisdictions like Canada, Australia, and Pakistan the official law of the State tells us that it gives voice to and protects pre-colonial forms of social and cultural difference, and does so through the recognition that socially-different communities have separate, and often conflicting, normative structures and behaviours that cannot reasonably be expected to 'co-operate' with the dominant structures of the State. This reality, the law often claims, requires the demarcation of separate spatial domains for the operation of distinct forms of legal normativity (i.e. the

Reservation, the Tribal Area, the private sphere). These discussions appear to be alluding to the emancipatory function of law.

However, the belief that these separate spatial domains remain normatively unconnected and legally and politically distinct is inaccurate. In Chapter Three and Four I discuss how the Aboriginal Reservation and the Tribal Areas, though they are constructed as separate cultural enclaves and legally distinct regions are not entirely 'neutralised' of State law, but actually represent spaces of legal excess, in which a number of different normative structures, institutions, and ideologies shape the day-to-day-social relations of life 'on the ground'. Moreover, I have also argued that colonial (and later postcolonial) law does not merely recognise pre-existing difference, but is actually intimately implicated in creating, reproducing, and circulating perceptions and imaginations of difference. This reading of law suggests that in these contexts, law has a regulatory function as well. I distinguished between the emancipatory/regulatory reading of liberal law in my earlier discussion and suggested that it has been stretched between the opposing aims of modern governance, that of regulation (i.e. its preoccupation with categorising, classifying, and containing difference), whilst also pursuing the more emancipatory goal of recognising and safeguarding plurality. For example, liberal law has had an emancipatory function for settler and mainstream societies, who have used it as a vehicle for defining and containing Aboriginality by producing legal geographies (patterned on their subjective experiences of foreign space and people) in order to immobilise and contain native communities. This emancipatory use of liberal law, in turn, has had a regulatory effect on immobilising the native body and compelling native communities to remain segregated in racialised 'designated' spaces of native presence (i.e. the Reservation).⁶⁵⁸

As a source of regulation and a discourse of emancipation liberal law aims to preserve stability within contemporary societies through the use of rules that make individual actions predictable. At the same time, it is an enabling discourse, used by individuals and groups to exercise resistance, appeal for greater political inclusion, and demand economic, social, and political transformation. Thus, law does not only have an emancipatory and regulatory function, but also exists as a site of social conflict, where the emancipatory struggles of some are set against the regulatory designs of others.

Santos develops this idea further and suggests that a mutually constitutive relationship exists between law and social conflict. This means that, while law may often be the source of social

⁶⁵⁸ This discussion relies on Santos' discussion of emancipatory and regulatory law. See, Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London, UK: Reed Elsevier, 2002), p 1-3, 439-45.

discontent, it is itself also produced and reproduced through the exercises of power and counter-power that inform these episodes of social conflict and political dissatisfaction. This is demonstrated by reference to a myriad of political and legal transformations that have taken place in Canada, for example, through native acts of resistance materialised through their challenging of the dominant legal discourse. Legal recognition of Aboriginal pre-contact occupation of Canadian territory, through the granting of native title, is one such example of how emancipatory challenges have produced changes in the law.

However, the counter-claim is that, while these acts of native opposition may represent some very important political victories for Canada's Aboriginal community, they do not necessarily trigger radical changes to the source and legitimacy of liberal law. In fact, it could be argued that Canadian Aboriginal title jurisprudence does little else but reconfirm the sovereignty of the State and the inviolable authority and legitimacy of colonial law as the law *par excellence*.⁶⁵⁹ I illustrated this in my discussion in Section Five of Chapter Three when I considered how Aboriginal demands for recognition of their sovereignty are usually misinterpreted as claims for land tenure, or property rights in land.⁶⁶⁰ According to this view, then, the regulatory and emancipatory challenges which both inform law and are shaped by law, are unceasing struggles. Santos confirms this in his claim that once emancipatory struggles achieve their intended aim, they then become the regulatory designs against which new emancipatory challenges are launched.⁶⁶¹ He states that:

[t]he success of emancipatory struggles is measured by their capacity to constitute a new political relationship between experiences and expectations, a relationship capable of stabilising the expectations on a new and more demanding and inclusive level. Put differently, the success of emancipatory struggles resides in their capacity to transform themselves into a new form of regulation, whereby good order becomes order. It is however, typical of the paradigm of modernity that such success should always be fleeting: once the new form of regulation becomes stable, new aspirations and oppositional practices will try to destabilise it on behalf of more demanding and inclusive practices...The tension between regulation and emancipation is therefore unsolvable.⁶⁶²

Liberal law, therefore, can operate as a vehicle of emancipation so long as it increases the discrepancy between past experience and future expectations by "calling into question the

⁶⁵⁹ In that it does not recognise this right of title as a 'proprietary' right that strips Canada of its territorial claim and thereby complicates its claims of sovereign political authority. Motha makes this claim in relation to Aboriginal title jurisprudence in Australia as well. See, Stewart Motha, "The Sovereign Event in a Nation's Law," *Law and Critique* 13, no. 3 (2002).

⁶⁶⁰ See the discussion in Chapter Three, p 172-5.

⁶⁶¹ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London, UK: Reed Elsevier, 2002), p 2.

⁶⁶² *Ibid.*, p 2-3.

status quo,” including the prevailing institutions, ideologies, and practices which inform the dominant legal discourse. Thus, if we understand liberal law as including the aim of developing norm-setting social institutions that regulate an individual’s understanding of themselves and their expectations of others, then the emancipatory function of law is maximised when it disputes and disrupts the prevailing identities and assumptions that people have about others around them.

A discussion of the emancipatory and regulatory potential of law becomes important for our analysis precisely because the processes of Occidental Legality have produced territory as a regulatory design which has, throughout history, reduced the emancipatory potential of law for native communities. One fundamental way in which this was achieved was by constructing racialised or culturally-homogeneous spaces of native presence that robbed the native subject of its agency. In ‘spacing’ native difference (i.e. placing the native subject to a disconnected spatial and temporal domain which is presented as neutral and beyond political contestation),⁶⁶³ contemporary societies divest these communities of a coeval space for opposition. Thus, we are given the impression that the language of the dominant legal discourse is incompatible and unable to address native claims for emancipation because the former speaks from a space of ‘modernity’ (linked broadly to secularism, liberalism, and notions of individual rights vested in the possession of property), while the latter is understood as speaking from the space of ‘pre-modernity’ (linked to religion and traditionalism, a focus on communal identities, and notions of land held in common). Consequently, in these instances, law and space are mobilised as antithetical discourses of cultural difference. When law has been activated as a mechanism of emancipation, spatial designs often works to temper these challenges, and vice versa. For example, in Chapter Three, I discuss how the Aboriginal women of Yankunytjatjara, Antikarinya, and Kokatha regions of Australia⁶⁶⁴ used their connection to the Earth to express resistance to politico-legal decisions to label their space ‘desert-lands’ fit for atomic-weapons testing. Two very different classifications of the same space – as ‘desert-lands’ versus ‘mother Earth’ – helped to mobilise the antithetical discourses of regulation and emancipation. Conversely I also discussed how the Reservation, as a demarcated and racialised production of space, worked to depoliticise Aboriginal claims for self-government.⁶⁶⁵ In this instance, the racial and cultural categorisation of the Reserve-space had the effect of moderating Aboriginal claims for autonomy.

⁶⁶³ Achieved through, for example, tropes of native primitivity through which the Tribal Area is structured.

⁶⁶⁴ See p 67.

⁶⁶⁵ See p 146.

Within the colonial setting, as I argue through my analysis in Chapter Three of biodiversity discourse and the legal production of ‘protected areas’, and my discussion of the settled/non-settled areas of Pakistan in Chapter Four, the operation of law was crucial for maintaining distance between settled and unsettled areas of the colonial space⁶⁶⁶ and to prevent any ‘misunderstanding’ about the native’s possession of an equivalent moral status to that of the European settler.⁶⁶⁷ The law-space nexus, therefore, reveals law as a relationship of power that historically materialised as a struggle to put distance between native and settler communities and to prevent racial intermixing. From this we are given the impression that the regulatory function of law can be disrupted through a questioning of the legal geographies that are produced through law’s focus on maintaining native-State or native-settler distance.

The intense focus on defining, othering, and immobilising the native body has, according to theorists like Bhandar, fundamentally reduced contemporary prospects for recognising the native as the political and moral equivalent of the settler. Bhandar’s work challenges the common assumption that legal recognition can be sufficient to secure emancipation for the native communities of once-colonised lands. More specifically, her analysis allows us to understand that there are potential impediments to native quests for legal recognition that need to be addressed if liberal law is to be mobilised as a vehicle for the emancipatory struggles of those that it has historically marginalised. I analyse Bhandar’s notion of plasticity and the native body in the section on mutual recognition below.

3. ‘Recognising’ the Native and Producing the ‘Subaltern’

In this section of the Chapter I critically analyse some of the more significant literature on the topic of recognition and identity-formation. I draw on the work of Charles Taylor, Brenna Bhandar, and James Tully to assess competing views of the conceptual framework of recognition. Over the course of this discussion I highlight points of convergence and assess areas of disagreement. I build on this work to explain the current trajectory of legal recognition in multicultural societies and, later, to advance my own theory of coeval recognition, which addresses some of the oversights in the existing literature and therefore represents an important contribution to the existing literature on recognition and minority protection.

⁶⁶⁶ See p 194-5 of my chapter on Pakistan.

⁶⁶⁷ I discuss this on a number of different occasions. For example, in Vitoria’s reading of *jus gentium* as a simultaneous universalisation and particularisation of colonial law that, at once, cast the native as ‘human’ and as an Other. This is also suggested in my reading of *Abraham v. Abraham* (p 128), where I argue that the scene of interplay between British and Hindu culture – which gave rise to the mixed-race ‘hybrid’ claimant – was effaced through the Court’s reliance on the pedigree of the claimant’s property to determine which law would be applied to the dispute at hand. The humanity of the hybrid, in this instance, was challenged through the Court’s use of spatial features (i.e. possession of property) to reject the possibility of cultural ambivalence and Anglo-Indian hybridity.

A. Theorising 'Recognition'

One of the enduring contributions of Hegel to contemporary social and political philosophy has been his concept of 'recognition'. Axel Honneth and Nancy Fraser have described the concept of recognition as "proving central to efforts to conceptualise today's struggles over identity and difference."⁶⁶⁸ Fraser suggests that the concept of recognition underlies the formation of a "difference-friendly world, where assimilation to majority or dominant cultural norms is no longer the price of equal respect."⁶⁶⁹ For them, political or legal recognition represents an affirmation of differently constituted identities and the equal moral worth of diverse worldviews.

Similarly, Taylor also perceives recognition as an integral component of social relations, describing it as a "vital human need."⁶⁷⁰ However, his understanding of recognition is more *prescriptive*, in that he believes that recognition is constitutive of our sense of self. He claims that our identity is "partly shaped by recognition or its absence, often by *misrecognition* of others...[we are] always in dialogue with, sometimes in struggle against, the things our significant others want to see in us."⁶⁷¹ Taylor insists that threats to one's self-identity not only emerge from a failure to recognise, but more importantly, from wrongful recognition or *misrecognition*; projecting an image of the Other that is "somehow inferior, 'uncivilised'."⁶⁷² Through forces of domination, he claims, these images are imposed on the Other himself, shaping his own self-identity. Based on this, he argues, that our sense of self, therefore, "can suffer real damage, real distortion, if the people around [us] mirror back to [us] a confining, or demeaning, or contemptible picture of [ourselves]."⁶⁷³ According to Taylor, recognition becomes constitutive of subjectivity (the inter-subjective nature of identity-formation). To prevent the harm that may be produced through potential misrecognition, Taylor advances the idea of a dialogical process of recognition, based on "self-discovery" and "self-

⁶⁶⁸ Axel Honneth and Nancy Fraser, *Redistribution or Recognition?: A Political-Philosophical Exchange* (London: Verso, 2003), p 1.

⁶⁶⁹ *Ibid.*, p 7.

⁶⁷⁰ Charles Taylor, "The Politics of Recognition," in *New Contexts of Canadian Criticism*, ed. Ajay Heble, Donna Palmateer Pennee, and J.R. Struthers (New York: Broadview, 1997), p 99.

⁶⁷¹ ———, *Politics of Recognition*, ed. Amy Guttmann, Susan Wolf, and Michael Walzer (Princeton: Princeton University Press, 1992), p 25, 32-3.

⁶⁷² ———, "The Politics of Recognition," in *New Contexts of Canadian Criticism*, ed. Ajay Heble, Donna Palmateer Pennee, and J.R. Struthers (New York: Broadview, 1997), p 100.

⁶⁷³ ———, *Politics of Recognition*, ed. Amy Guttmann, Susan Wolf, and Michael Walzer (Princeton: Princeton University Press, 1992), p 25.

affirmation...undefined by a social script." To be just, he believes, recognition must be mutual and equal, and the only way to ensure mutuality is by allowing the Other to speak for himself.⁶⁷⁴

Bhandar's work builds on Taylor's and presents an important critique against forms of minority protection grounded in the recognition of cultural difference. She relies on an understanding of recognition advanced by Fanon in *Black Skins White Masks*. Disputing Hegel's application of mutual recognition to the colonial setting, Fanon argues that within the context of colonial domination, the terms of recognition are set by the colonising forces and often internalised by colonised peoples.⁶⁷⁵ In the end, recognition does little more than affirm the political authority and legitimacy of the colonising State. Likewise, Bhandar also argues that contemporary forms of cultural recognition *misrecognise* Aboriginal identities precisely because it compels these communities to reinterpret their sense of self using Euro-Western ideologies, principles, and traditions'. This was perhaps best illustrated in Chapter Three over the course of my discussion on Aboriginal rights and title litigation and how communities seeking recognition of their status as equal and sovereign nations must reinterpret their relationship to the land in ways that are incommensurable with their own worldviews.⁶⁷⁶

In *Strange Multiplicity* Tully advances a similar thesis. In this book he proposes a scheme for the application of mutual recognition in multicultural societies. For him, all struggles for recognition under liberal law – which he describes as “jointly compris[ing] the ‘politics of recognition’ – are underwritten by peoples’ simple “longing for self-rule.”⁶⁷⁷ He argues that this desire to govern oneself according to one's own conception of the good is perpetuated by the belief that the basic laws and institutions of the State are unjust and “thwart the forms of self-government appropriate to the recognition of cultural diversity.”⁶⁷⁸ In Tully's view, contemporary governments can satisfy minority aspirations for self-rule not by being ‘difference-blind’ - trying to “transcend the cultural dimension of politics” - but by recognising and incorporating numerous cultural perspectives through joint constitutional discussion.⁶⁷⁹

The significant difference between Tully's thesis and the arguments advanced by both Taylor and Bhandar is that Tully perceives struggles for recognition as one dimension of political struggles and not struggles in their own right, and states as much in his article *Struggles over*

⁶⁷⁴ ———, "The Politics of Recognition," in *New Contexts of Canadian Criticism*, ed. Ajay Heble, Donna Palmateer Pennee, and J.R. Struthers (New York: Broadview, 1997), p 104.

⁶⁷⁵ F. Fanon, *Black Skin, White Masks* (Pluto Press, 1986).

⁶⁷⁶ See Section Five, of Chapter Four beginning at p 214.

⁶⁷⁷ J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge Univ Pr, 1995), p 4.

⁶⁷⁸ *Ibid.*, p 5.

⁶⁷⁹ *Ibid.*, p 6.

Recognition and Distribution.⁶⁸⁰ For him, recognition is perceived as a necessary condition for exercising forms of self-rule within the political arena. Conversely, Fanon, Taylor and Bhandar perceive recognition more intimately, as an integral component of identity-formation. We know *who we are* when our sense-of-self is validated through recognition by others. Therefore, from their perspective the right of self-rule does not suddenly become legitimate when it is legally recognised by governments. The right of self-rule for colonised peoples is perceived as flowing from their status as morally-equivalent political and legal communities and the dignity of their status as persons, not based on their 'difference', or by their capacity to conform to the Euro-Western model of the 'rational political subject'. Struggles for recognition, as such, are not instrumental, but perceived as struggles in their own right.

i. Legal Recognition

Within the context of Aboriginal claims for self-rule, legal recognition typically involves acceptance of indigenous peoples' history of colonial dispossession, and legal support for their claims for cultural autonomy based on their assertion of a separate and unique cultural identity.⁶⁸¹ Recognition has become an important conceptual framework through which struggles for political rights and cultural autonomy have been mediated. As Markell asserts, under multiculturalism, the politics of recognition differs from the Hegel's master/slave dialectic in that the State plays a primary role in moderating claims for recognition. Markell states, "in Hegel's parable the politics of recognition is played out face to face. In the contemporary political world, by contrast, struggles over recognition are paradigmatically struggles over the shape and behaviour of encompassing political institutions."⁶⁸²

In jurisdictions such as Canada and Australia, Aboriginal rights to self-rule offered on the basis of legal recognition often rely on validating the group's pre-contact occupation of and ties to portions of Canadian territory. As I argued in Chapter Three, this has had the effect of reducing their demands for recognition to the components of land and property relations, essentially denying Aboriginal peoples' appeal that the State acknowledge the political and legal parity of Aboriginal normative structures. In many cases this has meant that legal recognition and the accommodation of Aboriginal cultural practices have been granted without questioning the

⁶⁸⁰ James Tully, "Struggles over Recognition and Distribution," *Constellations* 7, no. 4 (2000): p 469.

⁶⁸¹ P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (London: Oxford University Press, 2005).

⁶⁸² Patchen Markell, *Bound by Recognition* (Princeton, NJ: Princeton University Press, 2003), p 2003.

legitimacy of the Crown's own claims to sovereignty,⁶⁸³ and often at the expense of genuinely affirming Aboriginal peoples' inherent right to self-determination.

The politics of recognition, as they are currently expressed in liberal States like Canada and in relation to once-colonised peoples, reiterates the legal and political validity of the 'sovereign event', the event that actually *produced* native cultural alterity and multiplicity, and did so through various processes of "displacement and exteriorisation" whereby the "co-existence of others, and the specification of difference, are recognised through the process of their being set aside [through an] imagination which, in spite of itself, starts from the 'One' and which constructs negatively both plurality and difference."⁶⁸⁴ The concept of territory is precisely that 'imagination' which facilitates 'setting aside' the coexistence of difference. This has become evident through the numerous expressions that legal recognition of Aboriginal peoples has taken in liberal societies – the recognition of cultural autonomy on the basis of prior occupation, the recognition of Aboriginal title, the implementation of the Reserve system. The concept of recognition has been integral to the continued displacement and exteriorisation of native peoples. Thus, to the extent that legal recognition purports to acknowledge pre-existing plurality and difference, it also tends to reproduce them through these new forms of 'spacing' native identity and culture (grounding native difference in geographic space).

In spatialising recognition, the State works to deny the simultaneous presence of a "plurality of sovereignty, law, and community,"⁶⁸⁵ by *displacing it*, locating it somewhere 'over there' so what we are left with a number of 'singular events' and entities which deny the presence of multiplicity *within* and cross-pollinations between. Legal recognition, as it currently stands, is not a viable political solution for Aboriginal peoples for two reasons. First, it articulates native sovereignty as emanating from the act of colonial recognition, while constructing colonial sovereignty as an inherent entitlement of the colonising power. As such, it fails to adopt the nation-to-nation understanding the relationship between Aboriginal peoples and the Canadian State. Secondly, the doctrine of discovery which legitimises State sovereignty (and confirms native inhumanity) forecloses the opportunity for native communities to articulate their (non-property) relationship to the land and natural environment. As I argue in Chapter Three, this inability to independently determine the course of their lives is what lies at the heart of Aboriginal demands for recognition. For Aboriginal peoples, the emancipatory prospects of legal

⁶⁸³ Stewart Motha, "The Failure of Postcolonial Sovereignty in Australia," *Austl. Feminist LJ* 22(2005): p 107.

⁶⁸⁴ Doreen Massey, *For Space* (London: Sage, 2005), p 53.

⁶⁸⁵ Stewart Motha, "The Failure of Postcolonial Sovereignty in Australia," *Austl. Feminist LJ* 22(2005): p 108.

recognition are severely undermined by its failure to sufficiently disrupt the pre-existing cultural boundaries which define native peoples as being stuck in time and rooted in space.

ii. Legal Recognition and Mutuality

Within the context of Aboriginal claims for self-government, the emancipatory potential of legal recognition is undermined by the fact that recognition is not offered on the basis of mutuality or reciprocity. The State and its legal institutions are entitled to recognise (or not recognise, or even *misrecognise*) Aboriginal peoples as separate and unique political entities and to do so through the use of colonial notions of spatial possession and ownership as the basis of legal and political subjectivity. This, as I revealed throughout Chapter Two, Three and Four, unfairly and unjustly reproduces the native subject as categorically subordinate to the sovereign nation-State, whose claims of territory and sovereignty (the grounds on which it bases its own political authority) remain uncontested because the terms and meaning of that relationship have been set by the colonial State itself.

In *Recovering Canada*, Borrows perceives liberal law's disregard for Aboriginal institutions and ideologies as having had a profound influence on the weakening of Aboriginal relations with their environment. He writes, "[t]he culture of the common law has imposed a conceptual grid over both space and time which divides, parcels, registers, on peoples and places in ways that is often inconsistent with Aboriginal participation and environmental integrity."⁶⁸⁶ For him, liberal law's inability to recognise those aspects of the natural environment, "forests, fields, roads, or settlements," which embody forms of Aboriginal settlement and use of land, has helped to conceal the fact that the "early possibility and pattern of settlement in North America often depended upon an appropriation or a systematic erasure of Indigenous environmental use."⁶⁸⁷ Borrows argues that any solution to Aboriginal peoples continued marginalisation requires that they be involved in planning and designing the forms of governance under which they live. And Aboriginal peoples' relationship to the land and environment, he writes, figures prominently in the way they envisage questions of political and legal governance.

These erasures of indigenous presence about which Borrows speaks were essential for advancing the colonial State's own claims of legitimacy and sovereignty under the doctrine of discovery. Under this doctrine, land that is 'discovered' (in the sense that its presence was unknown to other European empires) automatically gave its discoverers the power and property rights to prevent other imperial governments from laying claim to that land. The

⁶⁸⁶ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2007), p 30.

⁶⁸⁷ *Ibid.*, p 31.

country to have discovered the land in question also gained sovereign powers over its indigenous occupants. In the common law courts of some postcolonial States, like the U.S., property rights over discovered land have been defined as “absolute ultimate title.”⁶⁸⁸

In Chapter Two I illustrate how ‘discovery’ was declared by the presence of pristine wilderness and the lack of infrastructural and agricultural development.⁶⁸⁹ While the European powers’ property rights were ensured through its finding and settling of land, the imposition of its laws to native inhabitants had to be justified further. The legitimacy of replacing indigenous forms of governance with the common law of European colonies was predicated on the view that pre-contact Aboriginal cultures had little in the way of political and legal organisation. The Europeans, therefore, were perceived as having brought order and civilisation to the native communities already present on the land. This, of course, is disputed by a number of Aboriginal scholars. As Lindberg reveals, the Aboriginal peoples who lived on land appropriated by European settlers had complex legal regimes produced through their intimate relationship with the land. She writes, “it would be accurate to say that in occupying our traditional territories, colonisers broke and continue to break Indigenous laws...our mother [Earth] cared for us, we must care for our mother...It may be elementally stated but make no mistake, this is a complex legal regime comprised of responsibility, obligations, reciprocity, and interrelationships.”⁶⁹⁰ Similarly, Borrows’ *Canada’s Indigenous Constitution* traces a long and rich Aboriginal legal culture, drawing on the legal traditions of a number of different bands, and evidencing similarities – particularly in terms of their relationship to the environment – between them.⁶⁹¹ He highlights how these contributions to the Canadian legal culture are all but effaced through the consistent reiteration of a myth about the pre-contact legal and political underdevelopment of Aboriginal peoples.

While the Supreme Court has affirmed that Aboriginal peoples *do* possess traditional law and customs that can be traced to their ancestral heritage,⁶⁹² there has been a failure to address the implications of this reality. As a result, liberal law denies the pre-existence of an intricate and dynamic system of Aboriginal political and legal relations by continuing to compel Aboriginal peoples to make claims for cultural autonomy based on the terms set by the common law. These terms are inherently unfair precisely because they force Aboriginal peoples to demonstrate

⁶⁸⁸ Robert J. Miller et al., eds., *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010), p 41.

⁶⁸⁹ See p 83.

⁶⁹⁰ Tracey Lindberg, “The Doctrine of Discovery in Canada,” in *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, ed. Robert J. Miller, et al. (Oxford University Press, 2010), p 90.

⁶⁹¹ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto, 2012).

⁶⁹² *R. V. Van Der Peet*, 2 S.C.R. 507, para.40 (1996). Also see, *R. V. Mitchell*, 1 S.C.R. 911, para. 8 (2001).

their autonomy by reference to their pre-contact occupation of a land that the Courts never question as being outside the jurisdiction of the Crown. From this perspective, the Aboriginal peoples are *forced* to recognise the legitimacy of the colonial encounter and the intrusion of an alien legal system in Aboriginal affairs. The act of 'recognition', in this context, is shaped by the signs, symbols, and processes of Occidental Legality, which remain not only exterior to the Aboriginal communities seeking recognition, but are thoroughly implicated in their historical representation as subaltern Others.

From Fanon's perspective, this desire of the 'black man' to want to be "recognised as *White*", to be recognised on the terms of White settler society, proves problematic for the Hegelian conception of mutual recognition.⁶⁹³ In recognising the native as a subject dependent on liberal law for recognition of her/his legal subjectivity means that the native's own recognition of the State is not true recognition at all; for the native is not a self-determining agent. These conditions, Bhandar asserts, arrests the actualisation of human freedom. She argues that "the native subject, a creation of the settler, was (and remains) caught within relations of dispossession, alienation, and ownership that do not allow, in the absence of a dramatic rupture, for mutual recognition."⁶⁹⁴ The racialised body of the native shatters the political possibilities of mutual recognition precisely because of liberal law's reliance on Occidental Legality and the attendant modalities through which the 'blackness' of the native body is reproduced. The production of racial degeneracy becomes all the more complete in those instances when the native man, himself, internalises the reality of his condition so that 'becoming white', as Fanon suggests, is not even an intelligible option. As Fuss argues, "the [native] man under colonial rule finds himself relegated to a position other than the Other...Black may be a protean imaginary other for white, but for itself it is a stationary 'object'; objecthood, substituting for true alterity, blocks the migration through the Other necessary for subjectivity to take place."⁶⁹⁵

Yet, the dramatic rupture that Bhandar refers to is, also, not simply the absence or wholesale abandonment of liberal law. In my case study on the Tribal Areas of Pakistan I demonstrate how the absence of liberal law from the spaces and places in which native/tribal law operates has not given rise to more inclusive or socially just forms of tribal autonomy or protection of cultural diversity. Perhaps this is because, as my discussion of legal excess argues, Occidental

⁶⁹³ F. Fanon, *Black Skin, White Masks* (Pluto Press, 1986), p 45.

⁶⁹⁴ Brenna Bhandar, "Plasticity and Post-Colonial Recognition: 'Owning, Knowing, and Being'," *Law Critique* 22(2011): p 228. In the sense that the native subject is unable to imagine his subjectivity outside of the European-native bonds of domination and oppression that persist, and characterised the Imperial-Indigenous encounter. These bonds of domination, because they are 'raced' (Bhandar uses Fanon's term of 'epidermalisation' as the imprinting of oppression and domination on the body and skin of the native) are a visible and always present reminder to the native of his enchained state.

⁶⁹⁵ Diana Fuss, "Interior Colonies: Frantz Fanon and the Politics of Identification," *diacritics* 24, no. 2/3 (1994): p 21.

Legality conceals the omnipresence of liberal law so that 'tribal' and 'native' spaces are misconstrued as neutralised of other forms of normative ordering in order to make their over-regulation invisible to us. Equally likely, however, is the possibility that Occidental Legality misrepresents spaces of legal multiplicity so as to mask the interconnection and cross-fertilisation that occurs between liberal and native law (and culture).⁶⁹⁶ This may be pursued with the intent of reinforcing difference, as conceptions of social difference become harder to sustain in instances where one can point to cross-penetration between the self and the Other (i.e. where is no pre-colonial evaluative criteria to which it is now possible to return – either for settler communities now trying to be free of their 'history', or former colonies such as Pakistan who now have independence). Accordingly, while liberal law does not accord the native a space for mutual recognition, the aim should not be the erasure of liberal law altogether. This is partially because a space saturated by native law also does not afford that possibility, itself being a representation of culture that maximises the voices of some by minimising the voices of Others (e.g. women, off-reserve Aboriginals).⁶⁹⁷

More importantly, the act of relegating the native to another spatial and temporal domain (i.e. territorial autonomy on the basis of cultural difference) problematises mutual recognition as well. This is because it fails to acknowledge that the recognition of liberal law is dependent on the presence of conflict (or, using Foucault's notion of power, the presence of *counter-exercises* of power); of two normative systems coming into contact with and struggling against one another (i.e. Hegel's *master-slave dialectic* upon which Bhandar's reading of recognition is based) for *mutual recognition*⁶⁹⁸ or mutual exercises of power. Accordingly, to recognise by eliminating that potentiality for struggle and conflict also compromises the conditions for mutual recognition and mutual-empowerment, and the realisation of human freedom.

⁶⁹⁶ This is certainly Borrows' major contention – that liberal legal discourse fails to recognise Aboriginal contributions to liberal law, contributions that he believes would affirm their status as sovereign nations in the founding of Canada. See, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto, 2012).

⁶⁹⁷ For example, Anne Phillips discusses how liberal policies of non-intervention prevent the movement of the female body in ways that inhibit her from overthrowing the dominative structures of her religious identity and community. See, Phillips' discussion of rights of exit in Anne Phillips, *Multiculturalism without Culture* (Princeton, New Jersey: Princeton University Press, 2007), p 133-57.

⁶⁹⁸ Hegel's concept of recognition relies on the idea of property as the basis of individual rights and the assertion of identity. The Hegelian conception of reciprocal or mutual recognition describes the synthesis or negation of the self in the 'common will'. The 'individual' implied by the common will is an 'abstract individual' unmarked by social and cultural particularities. However, as the idea of property as the basis of individual rights is founded in European philosophical thinking (i.e. European modernity) and associated political, economic and social institutions, the abstract and universal subject becomes the *European* subject, unable to integrate the native due to the visible reality of the raced body. Georg Wilhelm Friedrich Hegel and S. W. Dyde, *Philosophy of Right*, Dover Philosophical Classics (Mineola, N.Y.: Dover Publications, 2005), Section I & II (Abstract Right and Morality), p 4-74. Also see, Brenna Bhandar, "Plasticity and Post-Colonial Recognition: 'Owning, Knowing, and Being'," *Law Critique* 22(2011).

The impossibility of mutual recognition necessitates that societies devise new ways of being and becoming. Bhandar notes that one way in which this could occur is through an acknowledgement of corporeal experience and lived reality – an ‘embodied’ subjectivity – that “precedes and exceeds the constitution of colonial subjectivities...that receives and gives form, that has the capacity to explode and shatter existing forms of reason and sense.”⁶⁹⁹ The body represents a site of instability precisely because of its ability to transgress, to act ‘illicitly’, unexpectedly, and improperly. The body becomes a modality of protest. In a way then, I interpret Bhandar’s work as an acknowledgement of human agency, expressed most violently through the acts of the body, and the presence of a precolonial subjectivity.

The risk that the native body represents, as a mode of transgression, resistance, and violence, has preoccupied the processes of Occidental Legality since the first Imperial-Indigenous encounter. The intense anxieties that arose from the settlers’ proximity to the racialised bodies of the native are what initially triggered the distance-making strategies of Occidental Legality. These techniques attempted to contain and restrict the native body’s mobility out of specific spaces (e.g. the Reservation and the Tribal Areas), devised ways in which its presence could be erased (e.g. biodiversity discourse, national parks, and ‘blank spaces’ on a map), and employed stable categories like landscape and climate to render the actions of the native body more predictable (e.g. describing native temperament as an extension of the landscape he/she occupied). Occidental Legality gave rise to a range of norm-creating institutions (courts, law enforcement bodies, even hybrid forms of indirect rule that used native agents, e.g. the *maliki* system) that maintained, circulated, and perpetuated these self-/Other-identities and rendered calculable the settlers’ (and later the postcolonial political community’s) expectations of the native.

These marked and coded spaces appeared to condition native life in ways that respect their demands for cultural autonomy. However, on closer examination, it was revealed that these spaces created distance between the national community and its perceived Others. These cultural geographies are symbols of the *worlding* of both native and State law, artefacts of a jurisdictional competition. While these cultural spaces are projected as areas of native autonomy, places subject to native legal jurisdiction, their presence and architecture continues to be subject to the laws of the State; laws that have, to a large extent, excluded native perspectives and worldviews.

⁶⁹⁹ Brenna Bhandar, "Plasticity and Post-Colonial Recognition: 'Owning, Knowing, and Being'," *Law Critique* 22(2011): p 229-30.

Yet, to limit the jurisdictional reach of native law to the confines of these geographies, created through State law, is an unacceptable solution for native people. As I discussed in Chapter Three, in seeking recognition these communities are not demanding accommodation – tolerant acceptance of their unique normative structures and institutions and the right to exercise jurisdictional authority in separate and divided spaces. Instead they desire full integration of their structures and institutions with those of the State, within one overarching liberal law, under conditions of intersubjective recognition. These communities are, as my earlier discussion on treaty rights and obligations in Chapter Three suggests, seeking the implementation of interlegal pluralism. My analysis in Chapter Four further iterates the necessity of joint mechanisms of regulation and shared jurisdiction, particularly in relation to the citizenship rights of particularly vulnerable native peoples (women in the tribal areas of Pakistan, and off-Reserve Aboriginal peoples). This desire for shared jurisdiction suggests that, though mutual recognition may appear impossible given the circumstances, it may also represent a sub-optimal solution to native demands for self-government. A more suitable solution considering the realities of postcolonial multicultural societies may be a form of recognition that encourages and respects not cultural *difference*, but rather cultural *melding* or hybridity. It is with this idea in mind that I propose the conceptual framework of *coeval recognition*.

B. Coeval Recognition

In the opening preface of their book, *Jurisprudence of Jurisdiction*, McVeigh and Dorsett write, “without an account of jurisdiction, jurisprudence would be left speechless, left without the power to address the conditions of attachment to legal and political order.”⁷⁰⁰ Through this they suggest that the value and meaning of law and legal regulation lies in its application in space, involving a number of devices and technologies through which law materialises in space and place. Space, in this context, need *not* necessarily be land or geography (though that is the subject of focus in this particular thesis). In fact, in the introduction to this thesis I discuss how Halдар, Godden, and McVeigh all analysed the manifestation of jurisdiction through the application of law on the body and the regulation of bodily functions and desires. Jurisdiction is the symbolic marker of how law ‘comes into being’, how it is exercised, by having an *effect* on something (whether that be the body or geography). It is also symbolic of who has the “power and authority to speak in the name of law.”⁷⁰¹ As such, jurisdiction is always produced through conflict, and often expressed as the melding of normative struggles into a dual expression of

⁷⁰⁰ Shaun McVeigh, ed. *Jurisprudence of Jurisdiction* (Abingdon, Ox: Routledge-Cavendish, 2007), ix.

⁷⁰¹ *Ibid.*, p ix.

regulation and emancipation. Jurisdictional struggles emerge when conflicting normative structures are simultaneously wrestling for control over the same 'space' (e.g. body, geography).

The term 'allochronism' has been used in social science literature to refer to a form of ethnographic documentation by which anthropologists deny the "common, active, 'occupation', or sharing, of time."⁷⁰² A 'denial of coevalness' therefore, represents a "persistent and systematic tendency to place the referent(s) of anthropology in a time other than the present of the producer of anthropological discourse."⁷⁰³ As Fabian explains, the consequences of this denial is that it forecloses the possibility of communication between the subject and object. He states "social interaction presupposes intersubjectivity, which in turn is inconceivable without assuming that the participants involved are coeval...for human communication to occur, coevalness has to be *created*. Communication is ultimately about creating shared Time."⁷⁰⁴ What is further interesting about Fabian's concept of allochronism is that he understands it *not as a* tendency but as an "existential, rhetoric, political" *device*.⁷⁰⁵ He argues that as anthropology's complicity with the colonial encounter is revealed, it is the denial of coevalness – or allochronism – which continues to preserve Western dominance.⁷⁰⁶ For Fabian, therefore, the subject's denial that the Other occupies the same moment in time is a way in which to protect his own 'modernity', and thus superiority.

Recognising the coevalness of the Other has also been written about from the perspective of space rather than time. The concept has been introduced in literature analysing the current state of postcolonial critique.⁷⁰⁷ This literature highlights how recognising the simultaneity of 'pre-colonial' native and European history redirects our gaze to the question of hybridity, the intermixing between European and native histories which happened to take place during the moment of colonisation.⁷⁰⁸ Accordingly, the simultaneous presence of different histories, in the same moment and space, gave rise to cultural exchanges that, invariably, led to the development of new identities. The encounter itself produced an Orientalised 'pure' image of pre-colonial culture that colonised peoples are forever chasing, and colonial masters are consistently referring to in legitimising conquest. In theorising the 'pre-' and the 'post-', postcolonial critique

⁷⁰² Johanne Fabian, *Time & the Other: How Anthropology Makes Its Object* (New York: Columbia University Press, 2014), p 31.

⁷⁰³ Ibid.

⁷⁰⁴ Ibid., p 30-1.

⁷⁰⁵ Ibid., p 32.

⁷⁰⁶ Ibid., p 35.

⁷⁰⁷ Ali Behdad, *Belated Travelers: Orientalism in the Age of Colonial Dissolution* (Durham, NC: Duke University Press, 1999).

⁷⁰⁸ Michael O'Riley, "Orientalist Reminders of Postcolonial Images of France and Algeria," in *Discursive Geographies: Writing Space and Place in French*, ed. Jeanne Garane (Amsterdam: Rodopi, 1994).

either misrepresents or entirely evades the question of the 'is' and the 'now'. For O'Reilly, this tendency reveals a postcolonial "incapacity to contend with the shared nature of postcolonial cultural histories and responsibility in the contemporary era."⁷⁰⁹ Drawing on Sebbar and Ali Behdad, O'Reilly suggests that postcolonial critique can maintain itself as an 'oppositional praxis' through a form of self-reflexivity; as long as it continues to "maintain a coeval recognition of its own historicity, its own worldliness, and makes use of its historical consciousness to critique the cultural conditions that continue to produce unequal relations of power today."⁷¹⁰

Throughout this thesis I have illustrated how the natural environment and geography represent devices through which otherness and alterity are understood, categorised, and ultimately regulated. In Chapter Two I suggested that the first Imperial-Indigenous encounters from the fifteenth century onwards were documented, recorded, and arranged through the technologies of cartography, travel-writing, and imperial correspondence. These cultural narratives helped to map the foreignness of never-before encountered spaces and peoples as relics of a 'time passed.' The temporalisation of these groups – their emplacement 'back in time' – helped to legitimise the colonisation of their societies and the appropriation of their land. In Chapter Three, I move to how the nascent images of colonial peoples were further entrenched through the legal and political structures and forms of organisation that were being implemented within the British colonies in India, Australia and Canada. Land and geography played an important role in resolving the jurisdictional struggles that emerged during this time between the European settlers and the native populations. Land emerged as *territory*, terrestrial spaces mapped by rules of access and diversity. These produced cultural spaces with concentrated native presence – the Tribal Areas, the Aboriginal Reserve – and spatial discourses – biodiversity discourse, the public/private divide – both of which served to *create* distance between closely located, consistently overlapping, and often intercommunicating normative communities. In Chapter Four I develop this idea even further by demonstrating how native spaces themselves are colonial constructs. In so doing, I question whether these cultural geographies can ever appropriately address issues of diversity, the presence of interlegality, and the encouragement of cross-cultural dialogue. Through these four chapters I have highlighted how the construction of space has served to create the illusion of cultural incommensurability and a lack of intercultural penetration.

And yet, in Chapter Three I draw attention to the many ways in which colonial and settler populations interacted to produce joint systems of social regulation and political organisation. I

⁷⁰⁹ Ibid., p 172.

⁷¹⁰ O'Reilly quoting Sebbar and Ali Behdad in Ibid., p 173.

highlight, for example, how the native and common law interacted to create new strategies for managing the issue of inheritance between native/settler communities. In Chapter Three, I also draw on a sample of Aboriginal literature to spotlight the ways in which indigenous architectures are consistently challenging the jurisdiction of the Canadian State. While Canada has failed to recognise the colonial conception of territory and the Aboriginal peoples' views on space and geography as morally equivalent, cases like *Delgamuukw* are significant precisely because they demonstrate the openness of the common law to, perhaps one day, move towards this form of recognition. My intention in Chapter Four was to illustrate how protecting normative autonomy through the creation of cultural geographies is *not* what liberal societies should be aiming for. I draw on Aboriginal literature, particularly on Borrows and Chartrand, to argue that this is also not the solution that indigenous communities are striving for.

In the previous two sections of the current chapter I reveal how the current framework of legal recognition is inspired by tendencies to colonise and compartmentalise culture. They are driven to recognise difference and, thus, end up producing unilateral forms of recognition that satisfy neither the Crown's demand for native acknowledgement of its supremacy, nor native peoples' demands that the Crown affirm native sovereignty. The current models of recognition do not suffice. And there are at least two important reasons why these existing theories of recognition need revisiting, and which relate to the arguments that I have presented through this thesis.

The first relates to how Taylor conceptualises recognition. Taylor's view of recognition is attractive because it addresses one of the most crucial weaknesses of the late liberal practice of legal recognition, which is that, to be *recognised* by the dominant legal discourse, Aboriginal communities must frame their quests for autonomy and self-government in language cognisable to Euro-Western liberal law. As I discussed in the last section of Chapter Three, this often results in a distortion of their own worldviews and a misinterpretation of their cultural practices and ongoing relationships. For Taylor this is of concern because it has the effect of *misrecognising* the Aboriginal peoples.

However, one of the problems with Taylor's view of recognition is that it operates from the idea that recognition involves two existing identities and the "assumption that adequate recognition of the other's true identity will bring about reconciliation."⁷¹¹ One of the problematic consequences of the colonial encounter was that it rarely left distinct, pre-contact, identities intact. In colonial India there was constant shifting of identities as European political agents

⁷¹¹ Andrew Schaap, "Political Recognition through a Struggle for Recognition?," *Social and Legal Studies* 13, no. 4 (2003): p 524.

were told to adopt native and tribal practices and language in order to rule more effectively.⁷¹² Tribal leaders like the *mullah* and *maliks* also often alternated their loyalties between their kinship community and imperial agents.⁷¹³ Similarly, Aboriginal communities in Canada also embody fractured identities as they move off-reserve and work within the very Euro-Western liberal legal system linked to their historical marginalisation.⁷¹⁴ It is these nuances of the State-native relationship that Taylor's recognition does not quite capture, and which warrants the development of a new theoretical model. While the framework of recognition advanced by Taylor is based on the reciprocal acknowledgement of each other's identities, a more appropriate form of recognition would take as its focus the overlap between identities that are constantly being made and re-made through intercultural interaction. Unless this potential for hybridity and intermixing is acknowledged, political and legal solutions proposed by liberal societies can never fully live up to the aspirations of native communities.

The second reason why the current theories require modification is more pronounced in Tully's work in *Strange Multiplicity*. As I indicated earlier, Tully considers struggles for recognition as a component of native struggles for political rights.⁷¹⁵ Struggles for recognition, particularly in the context of Aboriginal struggles in Canada, are *not* merely about political rights, meaning the exercise of greater political power through the existing institutional structures of the State. They are far more. They are fundamentally about the State recognising that the prevailing system is, in itself, skewed against Aboriginal peoples and must be reformed through the incorporation of Aboriginal histories, and indigenous ideologies and institutions. As Asch notes, collapsing demands for political rights with recognition struggles gives credence to views that suggest that "the legitimacy of Canada's sovereignty and jurisdiction arises independently of the fact that indigenous peoples were already living here when they first arrived."⁷¹⁶

Canadian jurisprudence in relation to Aboriginal peoples suggests that Aboriginal rights are political rights that allow Aboriginal peoples to engage in cultural and traditional practices that pre-existed European contact. Since self-government, in Western political theory, is perceived as having a spatial element (i.e. in terms of territorial jurisdiction), it is believed that adjudicating claims to Aboriginal title and allocating land for the exclusive use and occupation of Aboriginal people, essentially *resolves* both claims for recognition and self-determination. By converting struggles for recognition into quests for political self-rule, the Courts are failing to

⁷¹² See page 122

⁷¹³ See p 126

⁷¹⁴ See p 248

⁷¹⁵ James Tully, "Struggles over Recognition and Distribution," *Constellations* 7, no. 4 (2000): p 469.

⁷¹⁶ And here Asch is specifically referring to Thomas Flanagan's *First Nations? Second Thoughts*. See, Michael Asch, *On Being Here to Stay* (Toronto: University of Toronto Press, 2014), p 5.

acknowledge the nation-to-nation view that Aboriginal peoples have of their relationship with the Canadian government. As the Dene nations in Canada assert:

What we the Dene are struggling for is the recognition of the Dene nation by the governments and peoples of the world. What we seek then is independence and self-determination *within* the country of Canada. This is what we mean when we call for a just land settlement for the Dene nation [emphasis added].⁷¹⁷

The legal misrecognition of the aspirations of Aboriginal peoples have taken the form of constructing and applying Aboriginal rights of self-rule through the group's positioning 'back in time' and in separate and divided spaces.⁷¹⁸

In advancing a theory of coeval recognition, therefore, I accentuate the idea that Aboriginal struggles for recognition are not solely, or merely, about political rights. They are about compelling the government to recognise alternative, morally equivalent, (and frequently overlapping) systems of political authority and legal jurisdiction within the territorial borders of the State. The objective of Aboriginal rights and title litigation is not to foster greater "reconciliation of the pre-existence of Aboriginal societies with the Sovereignty of the Crown."⁷¹⁹ As Asch explains, the Court's reading of Aboriginal struggles for recognition as the pursuit of reconciling Aboriginal rights with Crown sovereignty, limits "the open-ended process" of negotiation by erecting the "singular pre-condition: the agreement on the part of indigenous peoples that the scope of their political rights, and in particular their right to self-determination, is circumscribed by the fact that, at the end of the day, whatever rights they may have are subordinate to the legislative authority of the Canadian State."⁷²⁰ This reading of Aboriginal struggles for recognition takes the "view that with [European] settlement of Canada the sovereignty and jurisdiction of the political societies who were already here was nullified."⁷²¹ In these instances the exercise of sovereignty and jurisdiction is constructed as if it were a zero-sum practice; the legal and political authority of the Crown must be acquired by extinguishing the sovereignty and jurisdiction of the prior occupants of the land. There appears to be a denial of the potential of normative co-existence and institutional overlap between the two communities.

⁷¹⁷ "Dene Declaration," (Dene Nation and Assembly of First Nations NWT1975), http://www.denenation.com/dene_declaration.html (Accessed: 2014 October 12).

⁷¹⁸ See p 142.

⁷¹⁹ To use C.J. Lamer's words in *Delgamuukw*. See, *Delgamuukw v. British Columbia*, 3 S.C.R 1010, para. 186 (1997).

⁷²⁰ Michael Asch, *On Being Here to Stay* (Toronto: University of Toronto Press, 2014), p 11.

⁷²¹ *Ibid.*, p 29.

The conceptual framework of coeval recognition addresses this impasse by drawing attention to how the colonial encounter was unique in its production of novel identities, new forms of governance, and unexpected legal and political developments. All of this *newness* emerged out of the interactions that took place between two, morally equivalent, and simultaneously present, normative communities. I highlight the importance of taking into account this interweaving of institutions and doctrines by emphasising three important facets of this relationship that point to and preserve relational simultaneity - the 'common, active, occupation' of a shared time and space. These are: the need to acknowledge the reality of hybrid identities and ways of being, the need for self-reflexive intercultural dialogue, and the discontinuation of policies aimed at immobilising (in space and time) the native body.

It is certain that dispute between the State and native communities, including the Aboriginal peoples of Canada, need to be settled through negotiation. Both Tully and Taylor advocate a dialogical process of recognition, and appear to be suggesting that the politics of recognition is too heavily focused on an acknowledgment of difference. Tully goes as far as to argue that this focus on difference overlooks the fact that the groups exemplified by the politics of recognition have similar aspirations, in that they all appear to be seeking "appropriate forms of self-government."⁷²² In *Strange Multiplicity* he proposes a new constitutional design, claiming that modern constitutionalism has been too narrowly structured around "two main forms of recognition: the equality of independent, self-governing nation States and the equality of individual citizens,"⁷²³ which fails to incorporate groups, like Aboriginal peoples, who do not fit these two very strict recognition models. What Tully's work appears to be suggesting is that a proper framing of that negotiation becomes necessary to ensuring that the rights and aspirations of these communities are not made subservient to those of the State.

While crucially modifying Taylor and Tully's conception of recognition by emphasising hybridity, my conceptual framework of coeval recognition also builds on Taylor and Tully's designs in its claim that the politics of recognition are currently too stringently focused on forms of cultural protection through recognition of difference. Over the course of this thesis I have explain how this recognition of difference has been spatialised in the form of cultural geographies like the Tribal Areas, the national parklands, and the Aboriginal Reservation. In many areas related to Aboriginal law, a concentration on recognising difference has produced the need to 'authenticate' Aboriginal culture by reference to knowledges gathered using Euro-

⁷²² J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge Univ Pr, 1995), p 4.

⁷²³ *Ibid.*, p 15.

Western standards of research and forms of documentation.⁷²⁴ My analysis of *Van der Peet* and *Delgamuukw* evidenced ways in which the authentication of Indigeneity and the affirmation of what constitutes a *valid* Aboriginal right has had the effects of *misrecognising* and *misinterpreting* Aboriginal culture.⁷²⁵ From these discussions it is apparent that the current model of legal recognition leaves much to be desired in the way of minority protection.

In suggesting a model of *coeval recognition*, therefore, I am proposing that liberal law refrain from adopting the fixed and ahistorical idealisation of the native self “whereby the constitution of oneself as an ‘authentic’ indigenous self has been conflated with specific ahistorical assumptions concerning the nature of indigeneity.”⁷²⁶ Instead, the core focus of coeval recognition is the acknowledgement and celebration of *hybridity*; the possibility of miscegenation, and the creation of new entities that cannot easily be defined through conventional dichotomies like civilised/uncivilised, modern/primitive, native/settler, pre-contact/contact.

To recognise an entity as ‘coeval’ is to acknowledge one’s own positioning within spaces of heterogeneity, accepting the presence of multiple, simultaneously, co-penetrating, coevolving historical and spatial trajectories that, at times, have the tendency to converge. It involves recognition of the self and Other’s simultaneous ‘being’ in time and space. Coeval recognition accepts the impossibility of mutual recognition (because a history of hierarchical power relations have entrenched representation in key power structures such as law, politics, and culture) and instead advocates for a position of multiplicity that allows the native to speak from his place and space of alterity. This understanding of recognition champions one’s acceptance of the radical Otherness of the Other (i.e. the settler’s recognition of the native’s Otherness), with the condition that one accepts the possibility of the native’s recognition of the settler’s Otherness as well. It is this form of recognition that allows cultural communities to exercise the greatest possible agency in determining their self-identity. It is these ideas that I explicate more formally in the proceeding several sections.

⁷²⁴ See pg. 150.

⁷²⁵ See p 135-6.

⁷²⁶ Manuhua Barcham, “(De)Constructing the Politics of Indigeneity,” in *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton, and Will Sanders (Cambridge, UK: CUP, 2002), p 138.

C. Coeval Recognition and the Plasticity of the Human Body

Coeval recognition can give expression to the 'plasticity' of the body⁷²⁷ if the intellectual architectures and political structures that inform our current ways of thinking about the realities of pluralism allow the native body to move and speak for itself as this is precisely what the processes of Occidental Legality have impeded. Liberal law, in many ways, is equipped to handle the integration of coeval recognition, and it has demonstrated its capacity to do so by allowing social groups to challenge hegemonic structures of knowledge in advancing claims for, among other things, greater political and legal autonomy, access to natural resources,⁷²⁸ better political representation, and recognition of historical dispossession.⁷²⁹ Yet, as the numerous critiques of liberal law discussed in Chapter Three and Four demonstrate, there is a need for crucial modification. Liberal law's emancipatory potential can be maximised through three transformations in our ways of thinking about the role, function, and processes of law in contemporary society. I summarise them briefly here, before moving on to discuss them in greater detail in Section (4), (5) and (6) of this chapter.

The first idea of acknowledging the *potential for hybridity* draws on a central theme of this thesis, that law is a cultural product. It is a product of social interaction that reflects our pattern of life and thus, to some extent, must be thought of as a 'living and breathing entity'.⁷³⁰ This view of law stands in stark contrast to the idea, especially positivist notions, that law is unproblematically to be understood as a universal, neutral, and stable system of regulation. While the law certainly provides the conditions that allow individuals to adopt a particular cognitive attitude and patterns of action (i.e. law as a norm-setting social institution), it is also constructed, reinforced, and transformed by patterns of transgressive behaviour and previously unanticipated and unexpected ways of thinking. If law is a cultural product then it has the potential for transformation, and is thus susceptible to being reshaped through the shifting attitudes and sensitivities that characterise our on-going social interactions.

As a social institution, law frequently reflects the values, ideologies, and principles of the society within which it is embedded. In the multicultural and globalised societies of today an emancipatory law should seek to reflect the interests and values of not only those who have power and whose viewpoint is often represented as a neutral viewpoint, but also minority

⁷²⁷ As Bhandar refers to the continuously shifting, unstable, and infinitely unexpected possibilities that the body in action throws up. Brenna Bhandar, "Plasticity and Post-Colonial Recognition: 'Owning, Knowing, and Being'," *Law Critique* 22(2011).

⁷²⁸ See, *R V. Sparrow*, 1 S.C.R 1075(1990).

⁷²⁹ P.G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011). Also see, *Eddie Mabo V. The State of Queensland (No.2)* 175 CLR HCA 23 1(1992).

⁷³⁰ See, Ehrlich's notion of 'living law' in Eugen Ehrlich and Nathan Isaacs, "The Sociology of Law," *Harvard Law Review* 36, no. 2 (1922).

communities that have been excluded and marginalised. One way in which contemporary societies can nudge liberal law in that direction is to acknowledge the potential of hybridity within the law, as well as the hybridity of the modern legal subject(s). Thus, the emancipatory potential of liberal law increases when it incorporates State law, native law and others forms of normativity that exist in the in-between spaces of what I have termed 'liminality', and it is maximised when liberal law remains consistently and forever open to the possibility of incorporating and synthesising these spaces of liminality.

A second way in which I suggest that coeval recognition can be actualised is through an eternally open-ended form of recognition that relies on continuous intercultural dialogue.⁷³¹ My notion of coeval recognition insists on a conditioning of this dialogue so that it becomes 'self-reflexive'. What I mean by 'self-reflexive dialogue' is communication that takes place through a conscious decision to remain open to having one's own pre-existing bodies of knowledge and points of reference being questioned, revised, and rejected. Encouraging and promoting the idea of *intercultural self-reflexive dialogue* is how societies can maximise the emancipatory potential of law.

And third, contemporary societies must recognise the *plasticity of the body*, particularly the native body, and should take steps to alleviate the structural inequalities that limit the (physical and imagined) mobility of the body and thus its free exercise of human agency. At the same time, the transformations that needs to occur in order for the emancipatory potential of liberal law to be realised – in order for liberal law to challenge our horizon of expectations – is also, partially, the responsibility of the native subaltern, who must consistently transgress, defy, and reject the traditional discourses through which his movements and expressions have been impeded.⁷³²

4. Acknowledging the Potential of Hybridity

The notion of hybridity has long interested scholars in postcolonial and critical race theory.⁷³³ Adopting, what I refer to as, a culture-as-construct approach,⁷³⁴ many of these commentators

⁷³¹ J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge Univ Pr, 1995), p 26.

⁷³² Gayatri Chakravorty Spivak, "Subaltern Studies: Deconstructing Historiography," in *Deconstruction: Critical Concepts in Literary and Cultural Studies (Vol.4)*, ed. Jonathan Culler (London: Routledge, 2003), p 222.

⁷³³ Homi Bhabha, "Of Mimicry and Man: The Ambivalence of Colonial Discourse," *October* 28(1984). *Also see*, Robert J.C. Young, *Colonial Desire: Hybridity in Theory, Culture, and Race* (London: Routledge, 1995). *Also see*, David Theo Goldberg, "Heterogeneity and Hybridity: Colonial Legacy, Postcolonial Heresy," in *A Companion to Postcolonial Studies*, ed. Henry Schwarz and Sangeeta Ray (Oxford, UK: Blackwell, 2005). *Also see*, Ania Loomba, *Colonialism/Postcolonialism 2nd Edition* (New York: Routledge, 2005), p 147-8.

have employed hybridity to elaborate race and culture as categories of difference that emerged through the colonial encounters. Using the term hybridity to complicate the idea of race and culture as distinct, easily differentiated, and self-contained identities, the notion of hybridity was used by writers to speak of conditions of 'in-betweenness'.⁷³⁵ Hybridity, therefore, denotes an 'inner dissonance' that speaks to the often patchy and heterogeneous nature of an outwardly singular and unified self that is projected (but which is in reality more complex because it is less singular and unified than the projection assumes). Simultaneously a representation of completeness and fracture, the hybrid entity embodies a "heterogeneous composite of contradictory elements";⁷³⁶ a union that is continuously on the verge of rupture. The usage of hybridity points to the complex dynamicity of human identity and behaviour. As a category (or perhaps symbolic of a lacking category) of analysis, the notion of hybridity is useful to my analysis because it reveals the limits of the human need to classify, categorise, and organise human behaviour and people's sense of self by pointing to how these purportedly stable

⁷³⁴ The culture-as-construct approach adopts the view that European expansion into non-European areas of the globe set in motion a range of ideological, political, economic, and cultural processes that acted as accompaniments to European military power. Edward Said, *Orientalism*, vol. 1 (London: Vintage Books, 1988). Also see, John L. Comaroff, "Colonialism, Culture, and the Law: A Foreword," *Law & Society* 26(2001). Also see, Bernard Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton, NJ: Princeton University Press, 1928).. As a result, culture is understood as a category constructed to facilitate the processes of conquest. Determinations of 'social difference' therefore represented exercises of domination perpetrated through the discourses of 'specialised knowledge' about the Other. See, Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1994). Theorists of social pluralism drawing on this tendency tend to focus more readily on making connections between differently imagined expressions of social difference – legal, cultural, political – to argue that categories of difference too often conceal the operation of discursive structures which have the effect of hierarchically ordering society so as to marginalise the minimise the value of the Other. See, Boaventura de Sousa Santos, "The Heterogeneous State and Legal Pluralism in Mozambique," *Law & Society Review* 40, no. 1 (2006). In comparison, the culture-as-reality approach acknowledges the fact that communities adopt different moral and ideological frameworks which then give rise to different ways of ordering social and political relations. Our different traditions, practices, and normative structures are then understood as the basis of our 'culture'. The category of culture is understood as being anchored in an objective reality or, as Kymlicka notes, "that there are deep and relatively stable differences between various kinds of [...]cultural groups." See, Will Kymlicka, "Do We Need a Liberal Theory of Minority Rights? Reply to Carens, Young, Parekh and Forst," *Constellations* 4, no. 1 (1997). These pluralists argue that European imperialism had the effect of replacing the native cultures of colonised peoples with European political and legal ideologies and institutions. See, Adam Ashforth, *The Politics of Official Discourse in Twentieth Century South Africa* (Oxford: Clarendon Press, 1990). Also see, T. Ruskola, "Legal Orientalism," *Michigan Law Review* 101, no. 1 (2002). Also see, Gordon R. Woodman, "Legal Pluralism and the Search for Justice," *Journal of African Law* 40, no. 2 (1996). Theorists working under this general belief tend to focus on 'uncovering' pre-contact native practices and institutions eroded by colonial expansion and European cultural and political domination, and work on developing ways in which a plurality of cultures can co-exist harmoniously under one political unit. See, Max Gluckman, *The Judicial Process Amount the Barots of Northern Rhodesia* (Manchester, UK: University of Manchester Press, 1955). Also see, ———, *Politics, Law and Ritual in Tribal Society* (Oxford: Blackwell, 2012). Also see, Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988). Also see, Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973). Often this has taken the form of evaluating non-European institutions and normative structures using European referents in order to determine the potential that they have to co-exist within the 'modern world'. See, Leopold J Pospisil, *Kapauku Papuans and Their Law* (Human Relations Area Files Press, 1964). This practice of using 'Europe' as the benchmark to evaluate other social and political structures has been vehemently condemned by some authors. See, for example, the Bohannon-Gluckman controversy in P. Bohannon, "Ethnography and Comparison in Legal Anthropology," in *Law, in Culture and Society*, ed. L. Nader (Chicago: Aldine, 1969).

⁷³⁵ Homi Bhabha, "Of Mimicry and Man: The Ambivalence of Colonial Discourse," *October* 28(1984).

⁷³⁶ Robert J.C. Young, *Colonial Desire: Hybridity in Theory, Culture, and Race* (London: Routledge, 1995), p 3.

categories are fleeting and open to transformation by the very agents upon whom this distorted identity is being projected as singular and unified.

Hybridity becomes crucial for maximising the political potential (i.e. the exercise of agency) of the native body through its acknowledgment of the possibility of cultural intermixing and miscegenation. The body is understood as having the potential to break-free from the preconceived categories and classifications of identity and culture, to form ways of becoming and being that waver between previously distinct, inflexible, and static categories of identity and difference. Furthermore, the concept of hybridity also recognises the coeval existence of the native and settler by acknowledging their potential to intersect in space and time; a criterion that must be met for the hybrid to exist.

Accepting the presence of hybridity within the law makes visible previously undetected social interactions,⁷³⁷ namely those that take place within the 'liminal spaces'⁷³⁸ of the law. This means that we are more readily able to identify and accept the legal character of social interactions occurring in places like the Federally Administered Tribal Areas of Pakistan – held in place by the more stable political units of Pakistan and Afghanistan. The notion of hybridity creates a more complete picture of Pakhtun identity. The FATA is revealed as a place characterised by tribal law, incorporating Pakistani citizens, who hold cultural and ethnic identities that are consistent with Afghan tribal communities located on the other side of the Durand Line (now an international border between Afghanistan and Pakistan). In recognising the hybridity of the Pakhtun individual, an identity that bridges a number of cultural, political, and legal divides provides space for renegotiating the disconnect between imposed and self-identities. Furthermore, in accepting the potential for hybridity, Pakistan secures conditions for bargaining political and legal accommodations and solutions that shy away from adopting essentialised understandings of what it means to be a 'Pakistani' and what it means to be 'Pakhtun'. An awareness of hybridity may provide the necessary impetus for governments to properly question and fully evaluate territorial solutions to normative diversity,⁷³⁹ instead focusing on

⁷³⁷ In so arguing I am adopting hybridity as both a descriptive as well as a normative concept, in the sense that legal hybridity and hybrid identities already exist, but spatio-legal concept of territory often conceals its presence, instead opting to compartmentalise difference. At the same time, the potential for hybridity should also be acknowledged to open up liberal law to the possibility of new ways of being and becoming that do not already exist.

⁷³⁸ By which I mean the precarious and tenuous phases bordered by complex, dynamic, and stable states or conditions of social interaction. Liminality has been described as a threshold period that is "structurally, if not physically, invisible." See, Victor Turner, "Betwixt and Between: The Liminal Period in Rites of Passage," *Betwixt and between: Patterns of masculine and feminine initiation* (1987): p 5-6. This means that, in the presence of more stable states of unity, the phases in between them become less visible.

⁷³⁹ Indeed, some authors go as far as to argue that territorial rights do not, in fact exist. Kolers, for example, argues that "borders are morally secondary, and territories they enclose are morally justifiable, if at all, only by appeal to the equal interests of all individuals everywhere." Accordingly he argues that rights can only exist when those holding those rights can be identified in the absence of the right itself. Kolers work, therefore, complicates the notion of

designing structures of governance that better address and shelter multiple dimensions of human identity and ways of being.

The notion of hybridity also further complicates the distinct categories of 'law' and 'culture', by throwing up the possibility that multiple legalities and cultures have the capacity to fade into one another,⁷⁴⁰ and co-constitute peoples sense of self.⁷⁴¹ This is a view that has acquired much validity and authority in the work of legal pluralists, who have argued that legal-centralism unnecessarily limits the emancipatory potential of law by privileging forms of legal normativity that can be traced back to the State.⁷⁴² It is also a view of law that has been advanced by those studying and living Aboriginal law. According to Borrows and Chartrand, for example, the Aboriginal peoples and the Canadian State are bound to one another by legal agreements, such as land treaties and legal judgments related to Aboriginal rights and title.⁷⁴³

Constructing the postcolonial State as a colonial institution,⁷⁴⁴ partially perpetuated by the dispossession and oppression of native communities,⁷⁴⁵ many pluralists advocate for a vision of law and legal normativity that accepts multiple sites of law-construction⁷⁴⁶ and triggers for legal

territorial rights and territorial autonomy by pointing to how these rights should be derived by looking at other, non-territorial aspects of Indigenous treatment and experiences. See, Avery Kolers, *Land, Conflict and Justice* (Cambridge: Cambridge University Press, 2009), p 32-3.

⁷⁴⁰ Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999), p 2. Also see, Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999," *Journal of the Royal Anthropological Institute* 7(2001). Also see, Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988). As Stoler notes, colonial cultures were almost always an amalgam of "European food, dress, housing, and morality [which were] given new political meaning in specific colonial social orders." See, Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2002), p 24.

⁷⁴¹ Carol J Greenhouse, "Legal Pluralism and Cultural Difference-What Is the Difference-a Response to Professor Woodman," *J. Legal Pluralism & Unofficial L.* 42(1998): p 65.

⁷⁴² Griffiths focuses on the idea of State recognition as the basis of non-State legal normativity and its implicit advocacy of the ideology of legal centralism. John Griffiths, "What Is Legal Pluralism?," *Legal Pluralism & Unofficial Law* 24(1986). Benda-Beckmann suggests that traditional pluralists have spent too long focusing on the law-State link, which has had the tendency of diminishing other equally important aspects of understanding legal complexity which may be useful for the theoretical and conceptual project of legal pluralism. See, Franz Von Benda-Beckmann, "Who's Afraid of Legal Pluralism?," *Journal of Legal Pluralism and Unofficial Law* 47(2002).

⁷⁴³ Borrows epitomises this melding of legal cultures and perspectives in his narrative of the *Nanabush* or *Trickster*. See, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2007), p 57-60.

⁷⁴⁴ In the sense of inheriting colonial political, legal, intellectual and economic structures and institutions. John Griffiths, "What Is Legal Pluralism?," *Legal Pluralism & Unofficial Law* 24(1986). Also see, Daniel PS Goh, "From Colonial Pluralism to Postcolonial Multiculturalism: Race, State Formation and the Question of Cultural Diversity in Malaysia and Singapore," *Sociology Compass* 2, no. 1 (2008).

⁷⁴⁵ Some writers have argued that the entire division between 'official law' and 'customary law', which lies at the heart of traditional theories of legal pluralism, has been invented through the colonial encounter in order to subordinate precolonial forms of rule-making and rule-enforcement. Francis G. Snyder, "Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal," *Journal of Legal Pluralism* 19(1981).

⁷⁴⁶ Also see, Robert M. Cover, "The Supreme Court 1982 Term, Forward: *Nomos* and Narrative," *Harvard Law Review* 97, no. 4 (1983). Also see, Kleinhaus and Macdonald have identified not only legal institutions as having creative value for the law, but legal subjects as well through their attachment of normative value to events and relationships. See, Martha-Marie Kleinhaus and Roderick A. Macdonald, "What Is a *Critical* Legal Pluralism?," *Canadian Journal of Law & Society* 12(1997).

behaviour.⁷⁴⁷ Some pluralists that adopt a culture-as-reality⁷⁴⁸ approach to theorising law, champion the idea that contemporary societies should strive to protect and permit the co-operation and co-existence of a number of normative systems within the political territory of the State.⁷⁴⁹ More critical variants of pluralism counter-claim that societies need to, in actuality, move away from systemic notions of law, instead focusing on preserving and nurturing the intersections and cross-fertilisations between normative structures, institutions, 'legalities', and ideologies (i.e. that we focus on the liminalities within the law that defy categorical definitions).⁷⁵⁰ Others also highlight how our normative behaviour is shaped not only by legal discourse, but by a variety of other discursive structures that shape and influence our cognitive behaviour. Our perceptions of 'the legal' are therefore, produced through both the official law and institutions of the State, along with a variety of other intellectual structures.⁷⁵¹ Collectively many of these theorists appear to be suggesting that law and culture, law and society, should be understood as phasing into each other. They seem to be implying that our law is a reflection of our conventional practices, so that often distinctions between different laws and different cultures cannot be easily differentiated and identified.⁷⁵² At the same time, however, some pluralists are weary of recognising non-State law as 'law', precisely because it conceals the

⁷⁴⁷ RM Cover, "Violence and the Word," *Yale LJ* 95(1985). Griffiths and Moore believed that legal normativity was shaped by a number of intersecting social bodies that were both capable of producing and enforcing norms. Yet these bodies were understood as partially-closed ('semi-autonomous') normative "venues that are also sites of cultural solidarity." See, Carol J Greenhouse, "Legal Pluralism and Cultural Difference-What Is the Difference-a Response to Professor Woodman," *J. Legal Pluralism & Unofficial L.* 42(1998): p 66.

⁷⁴⁸ See FN 734.

⁷⁴⁹ Indeed Kymlicka claims that our liberal, democratic values demand that we respect and protect the presence of cultural diversity. See, W. Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (New York: Oxford University Press, 2007). Also see, Chandran Kukathas, "Cultural Toleration," in *Ethnicity and Group Rights*, ed. Ian Shapiro and Will Kymlicka (New York: New York University Press, 1997).

⁷⁵⁰ Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law," *Journal of Law and Society* 14, no. 3 (1987). Also see, Boaventura de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada," *Law & Society Review* 12, no. 1 (1977). Also see, Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973). Also see, John Griffiths, "What Is Legal Pluralism?," *Legal Pluralism & Unofficial Law* 24(1986). Also see, Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Surrey, England: Ashgate, 2009).

⁷⁵¹ Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13(1991).

⁷⁵² Santos refers to this as conditions of legal 'porosity'. See, Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London, UK: Reed Elsevier, 2002), p 437. Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Surrey, England: Ashgate, 2009). Also see, Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Surrey, England: Ashgate, 2006). Carol J Greenhouse, "Legal Pluralism and Cultural Difference-What Is the Difference-a Response to Professor Woodman," *J. Legal Pluralism & Unofficial L.* 42(1998): p 65. Tamanaha offers this up as a critique of legal pluralist thinking, suggesting that it often inappropriately collapses law and culture so that law becomes, virtually, 'everywhere'. Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993). Teubner is also critical of the view the social sciences view that discourses external to the law should be permitted and recognised as having the capacity to design and redesign the boundaries of the law. See, Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13(1991). For a challenge to Teubner's methodology see, Simon Roberts, "After Government? On Representing Law without the State," *The Modern Law Review* 68, no. 1 (2005).

power that State law is able to exercise.⁷⁵³ Whatever else may be considered law, there is little doubt that the official law of the State *is* law, and thus it enjoys a degree of legitimacy and authority that other forms of normative ordering do not.

In being receptive to opening up our social institutions to the possibility of human and ideological miscegenation, contemporary societies can more appropriately develop solutions that do not conceptually equate legal pluralism with cultural pluralism (i.e. in the sense that we understand that law is intimately involved in the way that we understand and, in many ways, operationalise our understanding of our sense of self; but also that normative difference is often used by those external to a group to make decision about 'belonging together in a cultural group').⁷⁵⁴ Essentially that we do not make *a priori* judgments about cultural inclusion/exclusion based on legal difference.

Being more sensitive to the potential for hybridity that people and ideas have may reveal the many ways in which liberal law currently shapes identity and culture in the image of the more dominant classes whose values and ideologies the law reflects, and how the processes of doing so may be injurious to those whose sense of self the law fails to integrate, incorporate, and protect. This was, for example, illustrated through my discussion in Chapter Three about the *Delgamuukw* case, and the court's interpretation of Aboriginal identity and colonial treaty obligations in ways that were inconsistent with the plaintiff-community's self-definition.⁷⁵⁵ An understanding of hybridity within law-making – the possibility of superimposition and interpenetration between the once-stable categories of official and non-official law – may better recognise hybrid conceptions of legal subjectivity; that people may still perceive themselves as legal subjects and their practices as having legal legitimacy and validity even in the absence of the normative criteria set by official State-law (e.g. possession of property through 'appropriate' usage and continuous and historical occupation). This requires opening up the criteria of how we define legal categories and the way and terms on which we allow these subjects to access law, legal remedies, and legal institutions. This may reveal the inadequacies of a model of autonomy centred on recognition, which does not overcome the problem of Occidental Legality precisely because it ties autonomy to the idea of territory, which is, itself, part of the problem.⁷⁵⁶

⁷⁵³ Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993).

⁷⁵⁴ Carol J Greenhouse, "Legal Pluralism and Cultural Difference-What Is the Difference-a Response to Professor Woodman," *J. Legal Pluralism & Unofficial L.* 42(1998): p 65.

⁷⁵⁵ Dimitrios Panagos, "The Plurality of Meanings Shouldered by the Term 'Aboriginality': An Analysis of the *Delgamuukw* Case," *Canadian Journal of Political Science* 40, no. 3 (2007). *Also see*, p 142-3.

⁷⁵⁶ As I demonstrate in my earlier discussion of the Reservation in Chapter Three *See*, p 146. *Also see* my discussion of the Tribal Areas in Chapter Four. *See*, p 196

Hybrid identities, hybrid cultures, and hybrid law thus tend to acknowledge the potential inter-mixing between ‘differently-constructed’ peoples, which is precisely what Occidental Legality made unimaginable for us. These conceptions of the ‘interlegal’⁷⁵⁷ an acknowledgement that there is no stable, singular, autonomous, and sacred category of ‘law’ (as liminal spaces like the Tribal Areas indicate), opens up new possibilities for interaction between previously divided and conceptually incompatible societies. In so doing we begin to recognise the artificial construction of these once-enduring intellectual (and later, institutionalised) categories of legal and cultural difference as having been perpetuated for the purposes of exercising power over those whom are being defined through its gaze.

5. Self-Reflexive Intercultural Dialogue

The notion of hybridity provides the necessary groundwork to build a more emancipatory liberal law by enhancing prospects for intercultural self-reflexive dialogue. Recognition of both hybridity and the capacity of once culturally incommensurable⁷⁵⁸ communities to engage in dialogue is necessary for coeval recognition because it accepts the Other’s presence within the same temporal and spatial domain. Native-State dialogue was shaped, often limited, and in the case of Pakistan completely foreclosed, by the discursive traditions that placed the native and settler (or the native and the political community of the State) in different historical epochs and territorial units. Occidental Legality compelled the native to engage with the State/settler on the terms set by the colonial experience,⁷⁵⁹ consistently forcing the native to jam his sense of self into the pre-made categories of culture that had previously dispossessed the native of his land (and by extension, political and economic power). The property-relations of colonialism, carried forward into the postcolonial period through liberal law’s design of Aboriginal title, territorialised forms of self-government, and spatial expressions of cultural autonomy that, as I argued in Chapter Three and Four, made liberal law’s unequal application invisible to us. The dialogue through which native/State interactions emerged was one-sided, skewed in the favour of the settler-State, and often misrepresented the native in ways injurious to his identity, integrity and, most importantly, claims to humanity.⁷⁶⁰ Accordingly, when liberal law recognises

⁷⁵⁷ I borrow the term from Santos to suggest that social life is constructed through the intersubjective interactions by multiple legalities (State, custom, religion, etc). See, Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London, UK: Reed Elsevier, 2002), p 97.

⁷⁵⁸ This idea finds resonance within Kukathas work, which essentially argues that group rights are a political (rather than cultural) construct, and thus we need to acknowledge the fluidity and similarities of human behaviour. See, Chandran Kukathas, *The Liberal Archipelago* (Oxford: Oxford University Press, 2003), p 90.

⁷⁵⁹ Kleinhaus and Macdonald refer to this tendency of official law as having manipulated “the points of reference of the officious legal ‘language game.’” See, Martha-Marie Kleinhaus and Roderick A. Macdonald, “What Is a Critical Legal Pluralism?,” *Canadian Journal of Law & Society* 12(1997).

⁷⁶⁰ I discuss this in Chapter Three and my discussion of Vitoria’s work. See, p 115.

its own potential for hybridity (and that of its subjects), the possibilities for coeval dialogue and recognition are heightened.

An awareness of legal/cultural hybridity opens up the opportunity for dialogue to become self-reflexive and intercultural. Self-reflexive intercultural dialogue further emancipates the native body by recognising not only the simultaneity of native/settler existence, but the possibility that such simultaneity has the potential to radically transform both the settler and native in ways that challenge the stability and coherence of their identity and give rise to new 'hybrid' ways of being and becoming that involve an intermeshing of minority and dominant perspectives.

From my earlier discussion about the political possibilities that critical theories of pluralism open up through their articulation of an interactive and interrelational conception of legal normativity, it becomes possible to imagine the value of communicative processes to developing and expressing legal/cultural hybridity. Patterns of communication, particularly as they occur within the Canadian and Australian legal context, have largely been structured through reference to colonial conceptions of difference and alterity. Often this has robbed the subaltern of her/his voice by forcing her/him to articulate their sense of self through the political and legal language and institutions tied to their historic dispossession (i.e. they are having to adopt the language of Occidental Legality, reproducing their identity so as to be recognised as subjects worthy of engaging with the law).

More problematically, in the Pakistani example this communication is further impeded by the State's refusal to extend the language and institutions of the official law to its Pakhtun community within the FATA. This has, as I argued in Chapter Four, entirely foreclosed the possibility of opposing, contesting, resisting, and reconstructing the tribal identities imposed on the Pakhtuns of the North-West Frontier by their colonial masters and which have become the basis for the uneven and oppressive application of contemporary State-law (e.g. the continued operation of the Frontier Crimes Regulation).

I submit that coeval recognition, and acknowledgement of hybridity, requires processes of communication that take place outside of the historically inherited hierarchies (of law and culture) produced through determinations of (cultural, social, legal) difference and expressed, largely, through territorial/spatial distancing. As words and sentences, whether they are communicated through writing or orally, have no meaning in themselves, "[w]e cannot determine [their] meaning in isolation from the meaning of our other conceptions,"⁷⁶¹ it is only through dialogue that contemporary societies can create a common 'reality' – the product of

⁷⁶¹ Reidar Edvinsson, *The Quest for the Description of the Law* (Berlin: Springer, 2009), p 68.

agreement between participants⁷⁶² - incorporating the legal signs, symbols, and representations unique to their respective historical and normative perspectives (the intercultural component of dialogue). Furthermore, the dialogue must also be open to the possibility of shifting both minority and dominant perspectives in new ways through the incorporation of the Other's perspective(s) (the self-reflexive component of dialogue). I further discuss each of these components below.

A. Intercultural Dialogue

Some of the most prominent calls for intercultural dialogue have emerged from within the movement of multiculturalism (and cultural recognition and diversity more broadly), suggesting perhaps a growing sensitivity and receptiveness to hybridity within multicultural politics as well.⁷⁶³ Modood and Meer suggest 'interculturalism' as a possible hybrid alternative to the theory of multiculturalism, and suggest that it has a greater potential to recognise the 'in-betweenness' of cultural identities and the complexities of social interaction within a 'multicultural' world.⁷⁶⁴ The focal point of interculturalism is interaction and dialogue between cultural groups that emphasises commonality and prevents the solidification and essentialisation of cultural categories. Dialogue that is, intercultural, therefore is focused less on maintaining group identity and integrity (i.e. manipulating the dialogue so as to reflect their own cultural norms and practices) and far more committed to discovering points of convergence that provide more inclusive definitions of the political community without minimising the fact that the Other exists (and should be appreciated as existing) beyond the intelligibility of the Self.⁷⁶⁵ Maximum plurality is recognised only when societies take into

⁷⁶² This idea of truth borrows from correspondence theory. See, Hilary Putnam, *Meaning and the Moral Sciences* (London: Routledge Revivals, 2013).

⁷⁶³ This is, of course, recognising that multiculturalism as a concept is diversely interpreted, and can sometimes be used to both adopt and reject similar positions or approaches to cultural diversity. See, H.K. Bhabha, "Culture's in-Between," in *Questions of Cultural Identity*, ed. Stuart Hall and Paul Du Gay (London: Sage, 1996). Also see, Nasar Meer and Tariq Modood, "How Does Interculturalism Contrast with Multiculturalism," *Intercultural Studies* 33, no. 2 (2011): p 178-80. Also see, Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (New Jersey: Princeton University Press, 1996), p 67-94. Young points out the deficiencies of Benhabib's deliberative framework democratic legitimacy by pointing to its cultural-bias. Instead, she puts forth a more 'intercultural' option that "understands differences of culture, social perspective, or particularist commitment as resources to draw on for reaching understanding in democratic discussion..." See, Iris Marion Young, "Communication with the Other: Beyond Deliberative Democracy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (New Jersey: Princeton University Press, 1996), p 120-36.

⁷⁶⁴ Nasar Meer and Tariq Modood, "How Does Interculturalism Contrast with Multiculturalism," *Intercultural Studies* 33, no. 2 (2011).

⁷⁶⁵ An act which is ultimately, Levinas argues, injurious to the Other (i.e. the self's reduction of the Other to something that is 'the same' as the self). Thus, the aim is not to create a universal and abstract subject modelled in the image of the self (the aims of mutual recognition), but a recognition that the self and other are both constructed categories that unfairly singularise multiplicity and hybridity. Thus, plurality exists through the co-presence of the two (hybridised) subjects, the self-identities of whom are shaped by the Other's presence. See, Emmanuel Levinas, Michael Bradley Smith, and Barbara Harshav, *Entre Nous: On Thinking-of-the-Other* (Cambridge Univ Press, 1998).

account and negotiate discontent between radically different perspectives,⁷⁶⁶ and essentially recognise each other's Otherness.

What is important about his form of dialogue, however, is that it encourages, even promotes conflict and disorder, in the sense of continuously emerging challenges to embedded and entrenched forms of cultural knowledge.⁷⁶⁷ From this view, intercultural dialogue should involve strategising models of social cohesion and inclusive national citizenship⁷⁶⁸ that resist the urge to implement permanent and one-fits-all solutions. In more pragmatic terms, this should, for example, translate into the State's rejection of the criterion of cultural continuity as manifestations of Aboriginality and expressions of native pre-contact customs. Coeval recognition would require societies to acknowledge the simultaneous presence of radically different, and continuously shifting historical and spatial trajectories. This means that 'native culture' does not simply end at the very exact moment of the 'sovereign event' and colonial claims over native space. It is possible, in fact it is a reality that native and settler cultures coevolved and often intersected (and continue to do so),⁷⁶⁹ within the *same space* (though the processes of Occidental Legality have defined these spaces in distinct and incompatible ways in order to create distance between communities and maintain perceptions of cultural difference). Thus, intercultural dialogue should be focused on maintaining and continuing this intercommunication with the aim of nurturing cultural/legal co-evolution.

Santos describes interpenetration and cross-communication between multiple social networks as evidence of 'legal porosity', and argues that the analytical potential of these interactions "is maximised, once it is made self-reflexive."⁷⁷⁰ The aim, he believes, is not to be merely performative in these encounters – "emphasising the contemporaneity...the uniqueness of the encounter"; but to be self-reflexive – "emphasising the non-contemporaneous roots of what is brought together."⁷⁷¹

⁷⁶⁶ Because a recognition of the 'radically different' also recognises the many cultures/identities/legalities in-between the self and the radically different.

⁷⁶⁷ Evidence of, perhaps, the dual emancipatory and regulatory functions of the law.

⁷⁶⁸ Nasar Meer and Tariq Modood, "How Does Interculturalism Contrast with Multiculturalism," *Intercultural Studies* 33, no. 2 (2011): p 177.

⁷⁶⁹ Craig Proulx, "Blending Justice: Interlegality and the Incorporation of Aboriginal Justice into the Formal Canadian Justice System," *Journal of Legal Pluralism* 51(2005). Proulx uses the Santos' notion of interlegality to explain how Aboriginal law has shaped the Canadian legal system. *Also see*, Boaventura de Sousa Santos, "The Heterogeneous State and Legal Pluralism in Mozambique," *Law & Society Review* 40, no. 1 (2006).

⁷⁷⁰ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London, UK: Reed Elsevier, 2002), p 418.

⁷⁷¹ In a sense, acknowledging the historical temporalisation of native difference, yet also simultaneously understanding it to have been powerful construct that was meant to impede the bringing together (in dialogue) of the native and settler perspectives/perceptions/imaginings/bodies. There is an acceptance that the 'native' is conceptually anchored in a temporal dimension forever structured by the Imperial expansion, but that such

B. Incorporating the 'Self-Reflexive' Component

In being self-reflexive, dialogue between social groups incorporate the possibility self-confrontation, which would, in some cases, require a self-limitation of relationships, processes, and sources of meaning that threaten the core precept of a (thought-to-be) stable society.⁷⁷² From this view, a notion of self-reflexive dialogue would suggest communicative processes based on a society's openness to reformulate, restrict, and/or thwart those constituting relationships, processes, and sources of meaning that threaten its foundational principles. For a liberal democratic society that may include the principles of autonomy and liberal equality, but it may also include the possibility of incorporating perspectives that challenge our current systems of thought,⁷⁷³ including the dominant perspective that law and territory need each other in order to properly operate and exist. Self-reflexive dialogue has value precisely because it compels groups to reappraise the benefits and impediments of their prevailing intellectual frameworks and ways of life, and to potentially reevaluate the principles that they hold most dear. As Parekh notes:

Since human capacities and value conflict, every culture realises a limited range of them and neglects, marginalises, and suppresses others. However rich it may be, no culture embodies all that is valuable in human life and develops the range of human possibilities. Different cultures thus correct and complement each other, expand each other's horizon of thought and alert each other to new forms of human fulfilment. The value of other cultures is independent of whether or not they are options for us...inassimilable otherness challenges us intellectually and morally, stretches our imagination, and compels us to recognise the limits of our categories of thought.⁷⁷⁴

Accordingly, the value of diversity relates back to the fact that a human being is enriched when she has more opportunity to experience and access different modes of self-expression.⁷⁷⁵ Thus, to argue for a system of self-reflexive intercultural dialogue, is to argue for a form of dialectic communication between normative regimes, which remains open to the possibility of social and political uncertainty, self-evolution, and self-redefinition. A system of interaction based *not* on maintaining a society of coexisting normative orders that are *tolerated* and *accommodated* by official legalities, but on societal networks that recognise the interpenetration and

conceptual limitations can be overcome through dialectical processes that allow the native to enter 'the here and now'. Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London, UK: Reed Elsevier, 2002), p 418.

⁷⁷² Ulrich Beck, "The Reinvention of Politics: Towards a Theory of Reflexive Modernisation," in *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order*, ed. Ulrich Beck, Anthony Giddens, and Scott Lash (Cambridge, UK: Polity Press, 2007), p 1-7.

⁷⁷³ Alluding to the emancipatory potential of liberal law and its capacity to challenge prevailing knowledge and institutional structures.

⁷⁷⁴ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (New York: Palgrave, 2000).

⁷⁷⁵ Charles Taylor, *Politics of Recognition*, ed. Amy Guttmann, Susan Wolf, and Michael Walzer (Princeton: Princeton University Press, 1992), p 32.

superimposition of different voices within the social (and legal) arena, each having an opportunity to shape the social and political outlook of others. In this sense, for the potential of this interaction to be maximised, the participants must be open to a radical reshaping of their own worldview (hence, the 'intercultural' aspect) by 'alternative modernities'.⁷⁷⁶

C. Forums and Strategies for Intercultural Self-Reflexive Dialogue

Self-reflexive intercultural dialogue is aimed at securing conditions in which a range of different social groups have a say in the development of the political and legal structures and institutions to which they will be subject. There can be a number of different (official/unofficial, formal/informal) forums in which this form of dialogue can take place.

One of the current forums in which intercultural dialogue occurs are the domestic courts, though it could be argued that the dialogue that takes place in the courts needs to, in many ways, be made more self-reflexive. Chapter Three of this thesis provides many examples that illustrate how the language of liberal law (pronounced through the courts) is often Occidental. This means that, frequently, in attempting to define native law and culture, the native subject is constructed through the use of Orientalist tropes of cultural difference and an over-reliance on colonial property relations (and its attendant notions of occupation, possession, sovereignty, and jurisdiction). These instances are examples of both the regulatory aspects of liberal law and the emancipatory challenges (in the form of native claims for title, recognition, and autonomy) that are brought against it.

Nonetheless, I submit that the emancipatory potential of liberal law can be maximised if the courts are more willing to accept prospects of hybridity and acknowledge the creative capacity of the native voice. This form of recognition can be expressed by, for example, moving away from the tradition of using 'expert knowledge' (in the form of empirical studies of anthropologists and sociologists trained in the Western-European tradition) to determine the authenticity and meaning of native culture. This involves not only a recognition that the native subject be permitted to speak for her-/himself unencumbered by external impositions of identity, but an acknowledgement of the fact that the concept of 'authenticity' is itself an artificial construction that unnecessarily limits the plasticity of the native body by denying it agency and rejecting its capacity to act in unanticipated and undocumented ways.

Domestic courts can further give voice to hybrid identities/cultures/law by recognising that there are numerous other, often informal forums, in which intercultural dialogue can take place

⁷⁷⁶ Boaventura de Sousa Santos, "The Heterogeneous State and Legal Pluralism in Mozambique," *Law & Society Review* 40, no. 1 (2006).

– literature, academia, and politics to name a few. Thus, in some respect, this would be asking the courts to accept a critical pluralist vision of ‘law’ as a social institution produced through a number of different sources and across a variety of discursive planes. This means that the courts should remain receptive to incorporating minority and subaltern perspectives from non-traditional sources, grounded in culturally-diverse discursive traditions.⁷⁷⁷ This is a largely uncontroversial recommendation, given that judges already draw on Anglo-European scholarship in the areas of philosophy, qualitative sociological research, historical texts, and literary theory over the course of their decision-making.⁷⁷⁸ Furthermore, as Chapters Two and Three of the thesis demonstrated, the common-law itself is founded on subjective forms of Imperial witnessing (i.e. travel narratives, letter-writing, and cartography). What I am suggesting, therefore, is that a similar opening up of liberal law be extended to, and be mobilised by, non-European literary, historical, academic, philosophical, and artistic sources and perspectives as well. While it can be argued that replacing current models of testimony with these other sources may heighten the instability and unpredictability of the law, this is a critique that adopts a Eurocentric perspective precisely because the failure to incorporate these sources severely destabilises the expectations of the law that minority communities have. Thus, this criticism works to prioritise Eurocentric expectations of the law and legal discourse over minority perspectives. Furthermore, the incorporation of multiple perspectives and sources of testimony maximises the emancipatory model of liberal law, because it further increases the discrepancy between our past experiences and future expectations – and thus provides greater possibility for a radically different future.

Apart from domestic courts, contemporary societies can nurture forms of coeval recognition by acknowledging that there are numerous settings through which legal normativity is generated.

This means that communities should be open to the resolution of disputes using native, Indigenous, tribal, and/or religious law and institutions (and perhaps even ones that escape discrete definitions). Indeed there are States that have established religious frameworks of law and adjudication in parallel with their common law systems (e.g. Pakistan and Indonesia), and there are a number of jurisdictions (United States and Britain) that integrate religious arbitration and tribunals into their legal system.⁷⁷⁹ One crucial modification that coeval

⁷⁷⁷ For instance, including Aboriginal oral histories as expressions of native identity and law.

⁷⁷⁸ Richard A Posner, "Law and Literature: A Relation Reargued," *Va. L. Rev.* 72(1986). *Also see*, Laurens Walker and John Monahan, "Social Frameworks: A New Use of Social Science in Law," *Va. L. Rev.* 73(1987).

⁷⁷⁹ Steve Doughty, "Britain Has 85 Sharia Courts: The Astonishing Spread of the Islamic Justice Behind Closed Doors," <http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html> 2009. *Also see*, Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law," *Theoretical inquiries in law* 9, no. 2 (2008).

recognition demands is that contemporary societies devise ways to rethink the space-law nexus so as to allow minority communities to draw on different legal structures and institutions outside of their 'designated spaces' of operation (e.g. Tribal Areas, the Reservation). In essence, contemporary societies need to take to heart the critique that law 'despatialises space',⁷⁸⁰ that it robs space of its emancipating function by regularising it and extracting from it its divesting space of its spatial characteristics of simultaneity, juxtaposition, disorientation, and materiality, all the features of space that leave our shared futures open to reformulation and reconstruction. It is these very features of space – its mutability, its disorientation, its chaos - that contribute to its potential to act as a setting for emancipatory human interaction. Minimising the desire to predict, reify, stabilise, and map space allows for the exercise of greater human agency because the potential for interaction is less burdened by the imposition of boundaries, borders, and enclosures. Social interactions (and thus, identity processes) are no longer bound by the 'inside' and 'outside' of spaces and places. To give an example, in despatialising claims of autonomy – refraining from compelling normative communities to assert their autonomy through space (i.e. demonstrating prior occupation) - would allow social groups to live and interact with one another in accordance with their existing normative convictions, rather than trying to manipulate them to satisfy the spatio-temporal criteria set by the dominant legal discourse.⁷⁸¹ In so doing, contemporary societies enable the mobility of the native body to move beyond its racialised space of existence. This shift in thinking would, for example, inspire policy changes that would limit the disability to off-reserve Aborigines who clearly possess self-identities that bridge the native/citizen dichotomy by which they are currently defined and limited.

There are some commentators that have suggested that State-deference to legal cultures grounded in, for example, fundamentalist religious norms may have the adverse effect of further oppressing traditionally vulnerable groups such as women and children.⁷⁸² My focus on removing social, political, and material 'constraints' on the native body to encourage the exercise of human agency and autonomy, would require a liberal law oriented away from the non-interventionist approach advocated by some pluralists.⁷⁸³ This means that members of a

⁷⁸⁰ Andreas Philippopoulos-Mihalopoulos, "Law's Spatial Turn: Geography, Justice and a Certain Fear of Space," *Law, Culture and Humanities* 7, no. 2 (2011).

⁷⁸¹ By which I mean the criteria of having a fixed identity and a historical tie to the land, which includes use of the land in ways that is integral to their 'unique cultural identity'.

⁷⁸² Robin Fretwell Wilson, "Privatizing Family Law in the Name of Religion," *Wm. & Mary Bill Rts. J.* 18(2009). Also see, Avigail Eisenberg and Jeff Spinner-Halev, eds., *Minorities within Minorities: Equality, Rights, and Diversity* (Cambridge: Cambridge University Press, 2005). Also see, Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).

⁷⁸³ For Kukathas the potential for group-exit adequately protects against illiberal practices. (morally objectionable practices). However, as Phillips and Okin argue, this is not always possible for particularly vulnerable members of cultural communities (i.e. women). See, Chandran Kukathas, *The Liberal Archipelago* (Oxford: Oxford University Press, 2003). Also see, ———, "Cultural Toleration," in *Ethnicity and Group Rights*, ed. Ian Shapiro and Will Kymlicka

particular social group be allowed to select the institutions and structures to which they will submit their disputes and that specific measures be put in place to evaluate and oversee that those decisions are made with the greatest preservation of individual autonomy and integrity. Indeed, this lack of oversight in maintaining people's autonomous decision-making capacity to choose forums for the resolution of disputes, has had particularly deleterious consequences for the human rights of Pakhtun women living within the FATA. This is largely the result of FATA women not having the choice to submit their disputes to non-tribal forums like the domestic courts of the State. What is important to this overall process of protecting the most vulnerable members of society is that communities develop a system through consultation and dialogue that takes into account the perspectives and experiences of these vulnerable groups and implements mechanisms to prevent their further marginalisation. As to the details of what these mechanisms may entail, that is something that requires further review and necessitates context-specific design and development.

Another area that has already been identified as potentially benefitting from intercultural dialogue between indigenous and State institutions is the field of environmental protection as it relates to land-use experience and knowledge of Aboriginal peoples. As indicated in Chapter Three, Aboriginal peoples base their relationship to the land on respect and the obligation to protect, rather than rights and title. As Kapashesit and Klippenstein write, "Aboriginal environmental ethics reflect this sense of unity by emphasising balance and sustainability."⁷⁸⁴ They go on to argue that because Aboriginal ecological management systems may provide valuable and workable models for sustainable environmental relations, and because these are an integral element of the Aboriginal-land relationship, their environmental practices should receive recognition and protection as group rights through s.35 of the *Canadian Constitution Act*.

Indeed, the need to integrate Aboriginal and Euro-Western environmental protection schemes has also been highlighted by Borrows as an important component of Aboriginal peoples' right to self-government and recognition of the equal authority and jurisdiction of native law. For him, an acknowledgement of Aboriginal relationships to the Earth is integral to the exercise of legal pluralism precisely because these relationships represent morally equivalent voices about how to best "theorise, practice, and order our association with the Earth."⁷⁸⁵ While both Borrows and Kapashesit and Klippenstein see Aboriginal peoples' ecological relationships and frameworks as

(New York: New York University Press, 1997). Also see, Anne Phillips, *Multiculturalism without Culture* (Princeton, New Jersey: Princeton University Press, 2007), p 132-40. Also see, Susan Moller Okin, "'Mistresses of Their Own Destiny': Group Rights, Gender, and Realistic Rights of Exit," *Ethics* 112, no. 2 (2002).

⁷⁸⁴ Randy Kapashesit and Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection," *McGill Law Journal* 36(1991): p 925.

⁷⁸⁵ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto, 2012), p 239.

integral to the exercise of Aboriginal cultural autonomy, they each understand these rights very differently. While, the latter constructs them as aspects of a broader set of legally protected collective rights, Borrows conceives of them as an inherent right of Aboriginal peoples as self-governing nations.

The belief in Aboriginal peoples' inherent right to self-government further supports newly emergent ideas about the development of dialectical constitutionalism, which Tully most eloquently elaborates in *Strange Multiplicity*.⁷⁸⁶ Approaching the issue of normative pluralism from the simple question of whether contemporary constitutional dialogue is properly equipped to recognise and accommodate cultural diversity, Tully argues that modern constitutionalism too often relies on the view that political stability requires cultural uniformity. Advocating for an alternative solutions for recognising pluralism, Tully suggests that contemporary societies develop systems of direct negotiation and mediation that speaks to the particular interests of the parties involved. He thus puts forth the idea of a constitutional design developed through public discourse and intercultural dialogue which better recognises subaltern perspectives.⁷⁸⁷ Tully's scheme of, what appears to be a 'hybrid', constitutionalism provides one important avenue for recognising joint sovereignty.

Similarly Borrows highlights how recognition of shared sovereignty, through his concept of 'multijuridicalism', may require that the State take positive steps to undo the prevailing legal conception of Aboriginal rights as practices and traditions relevant to the exercise of a distinct pre-contact culture. This, he writes, "deprives [Aboriginal people] of protection for practices that grew through intercultural exchange, and minimises the impact of Aboriginal rights on non-Aboriginal peoples."⁷⁸⁸ Thus, while the Crown's sovereignty imposes a burden on Aboriginal people to conform to Euro-Western conceptions of rights and title, a similar burden is not imposed on the Crown to respect and regulate in accordance with Aboriginal doctrines. The relationship between the State and the Aboriginal peoples' appears to be unilateral. Like Tully, Borrows also draws attention to how Canada may be able to adequately recognise Aboriginal legal traditions through the "embedding of Indigenous diversity in Canada's central legal texts."⁷⁸⁹ In his view the common law system prevailing in Canada does not fully acknowledge

⁷⁸⁶ J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge Univ Pr, 1995).

⁷⁸⁷ But Tully's political theory has been criticised for relying too heavily on the assumption that sovereignty is a necessary prerequisite for the political, and that the State is the primary site at which political struggles and dialogue occur. He fails to adequately question the underpinning rationales of State sovereignty and authority, and instead accepts both as a *given*. Karena Shaw, *Indigeneity and Political Theory: Sovereignty and the Limits of the Political* (London: Routledge, 2008), p 147-8.

⁷⁸⁸ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2007), p 61.

⁷⁸⁹ ———, *Canada's Indigenous Constitution* (Toronto: University of Toronto, 2012), p 129.

Indigenous contributions which included the proliferation of advanced systems of diplomacy, treaty-making exercises, and frameworks for environmental protection and resource allocation. Borrows, therefore, argues that the Canadian legal culture continues to perceive and portray Aboriginal peoples as never having had such comprehensive and detailed systems of political and legal organisation. It also does not appropriately reflect the level of native dissent and opposition the early European settlers encountered. It is certain that the Aboriginal peoples of Canada had passionately defended their land and rights to the use own political institutions and laws. This, he believes complicates the common law's doctrine of 'reception'.⁷⁹⁰ Consequently, Borrows asserts that, in order to recognise the Aboriginal peoples as a nation, Canada's legal culture needs to adequately reflect the histories of Aboriginal peoples. What exact design this may take in the future remains to be seen, and is outside the scope of this thesis to discuss in any great length. However, both Tully and Borrows' work presents some exploratory options that may well serve future research into developing exercises of joint-sovereignty through forms of hybrid constitutionalism.

6. Contesting the Political and Economic Immobilisation of the Native Body

One of the most important aims of Occidental Legality was to stabilise, indeed immobilise, the movement of the native body so as to alleviate the perceived physical and psychological threats that the native body posed to the now proximally-located settler. Historically, these mobility-preventing strategies took the form of creating cultural spaces through the positioning of garrisons between the settled and unsettled districts of colonial space, the use of topographical features to shield the settler from native advancement, the construction of fences around the homes of settlers, and encasing the native by positioning lands reserved for their exclusive use amidst a sea of settler-dominated areas.⁷⁹¹

Strategies for exteriorising and displacing native communities contributed to the political, social, and economic underdevelopment of native-majority areas.⁷⁹² As I discussed in Chapter Four and my case study of the Tribal Areas of Pakistan, at times this underdevelopment was deliberate,⁷⁹³ symbolic of the polity's desire to sustain the impoverished status of its tribal community. In

⁷⁹⁰ Ibid., p 134-5.

⁷⁹¹ I discuss these distance-making strategies throughout Chapter Two.

⁷⁹² See Talbot's discussion of railroad development in the settled areas of colonial India and underdevelopment of the Baluchistan province of Pakistan. See, Ian Talbot, *Pakistan, a Modern History*, 3rd Edition (London: Hurst & Co., 2009), p 14. Some authors argue that the overdevelopment of metropolitan centres means that much of the economic and political life of the polity are controlled and regulated by institutions in areas that Aborigines have been displaced from. See, Stephen J Kunitz, "Underdevelopment and Social Services on the Navajo Reservation," *Human Organization* 36, no. 4 (1977).

⁷⁹³ For example, withholding adult franchise, and prohibiting the assembly of political parties in the FATA. See,

Canada native displacement was also meant to prevent their mobilisation against State institutions.⁷⁹⁴ The use of deliberate strategies for the social and political depression of Aboriginal communities has been a widely documented, and heavily criticised, aspect of Canadian and Australian governance,⁷⁹⁵ with many likening these technologies to acts of social and cultural genocide.⁷⁹⁶

The postcolonial State's preservation of similar conditions of impoverishment within the Reservation and the Tribal Areas continue to perpetuate forms of economic, political, and social marginalisation. It has been widely acknowledged that the Pakhtun residents of the FATA do not possess the same rights and entitlements of citizenship as the members of the polity living in all of the other provinces.⁷⁹⁷ The State has, in many instances, failed to provide an adequate level of healthcare, education, and opportunities for employment within the FATA and this has tremendously limited their enjoyment of citizenship rights.⁷⁹⁸ From my earlier discussion of the Reservation, I demonstrated how the State has made it extremely difficult for Aborigines to move off the Reservation, and it has done so by limiting their off-Reserve treaty rights, and interpreting their mobility as acts of reneging their Aboriginality.⁷⁹⁹

In each of these instances, the limitations placed on the psychological and physical mobility of the native body limit the possibility for coeval recognition precisely because the native is prevented from engaging, dialoguing, and communicating with the political community from a position of equality (i.e. as space is used as a form of coercion and containment). Moreover, economic and political constraints also impede the exercise of human agency by forcing native peoples to make choices that they would not necessarily make in a situation where such constraints were removed. For example, perhaps more of the Aboriginal population would move off the Reservation if they remained in possession of their treaty rights or, perhaps more off-Reserve Aborigines would exercise their right to vote in band elections if they were not forced to be physically present in order to do so.⁸⁰⁰ These protections and accommodations also

⁷⁹⁴ John L Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," *Canadian Historical Review* 64, no. 4 (1983).

⁷⁹⁵ Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, vol. 3 (Montreal: McGill-Queen's University Press, 1993).

⁷⁹⁶ Robert Krieken, "The Barbarism of Civilization: Cultural Genocide and the 'Stolen Generations' 1," *The British journal of sociology* 50, no. 2 (1999). Also see, Colin Tatz, "Genocide in Australia," *Journal of Genocide Research* 1, no. 3 (1999). Sometimes carried out through biological forms of assimilation. See, Katherine Ellinghaus, "Absorbing the 'Aboriginal Problem': Controlling Interracial Marriage in Australia in the Late 19th and Early 20th Centuries," *Aboriginal History* 27(2003).

⁷⁹⁷ Shaheen Sardar Ali, "Rights of Ethnic Minorities in Pakistan: A Legal Analysis, The," *Int'l J. on Minority & Group Rts.* 6(1998).

⁷⁹⁸ See my discussion in Chapter Four, see p 207-8.

⁷⁹⁹ See p 148-9.

⁸⁰⁰ *Corbiere V. Canada (Minister of Indian and Northern Affairs)*, 2 SCR 203(1999).

become important in order to maintain individual rights of 'group-exit'.⁸⁰¹ This means that, in places like the FATA, the State should ensure an adequate level of education and employment so as to better the position of the more vulnerable members of a cultural community so that they have the option, should they choose, to leave these designated spaces of cultural autonomy and pursue a life within mainstream society.

While recognising that the native is denied a degree of equality by being partially the construct of the settler imagination, and while fully accepting that native communities may see spaces of cultural autonomy (like the Reservation, and the Tribal Areas) as crucial and valuable aspects of their identity, when I speak of eliminating structural inequalities, I do not necessarily call for the elimination of these spaces. What I suggest is that societies reevaluate current processes which render these places sites of unequal and discriminatory treatment rather than (as a first step) challenge the discourse that these spaces are emancipatory (i.e. about granting rights and recognising diversity). This means that, first and foremost, States must recognise and take the fundamental steps necessary to ensure the full protection of their native community's citizenship rights (just as they would for all other members of their political community).

For Pakistan this must take the form of extending the State's law and courts to the Pakhtun communities of the FATA. This, I argue, is necessary for maximising the emancipatory potential of Pakhtun struggles because it allows them greater opportunity (and access to more forums) to challenge hegemonic intellectual and political structures - many of which locate the Pakhtun in a separate epoch of history and leave him unable to converse in the language of the dominant discourse - and enhances their access to modes of self-expression. In Canada and Australia this must include, amongst other strategies, recognising (and operationalising that recognition) that one's rights cannot be bounded by space in order to deny carrying them through to participate in mainstream processes in the areas of education, employment, and legal and political discourse.

While the growing fear amongst Canadians is that Aboriginal people are leaving rural areas and Reservations, opting instead to live and work within the urban city-centres previously dominated by the 'White' settler, a study of net migration flows between 1986 and 1996 revealed a growth in Reserve populations and a net outflow of Aborigines from city-centres.⁸⁰² This suggests that, even as Aborigines are choosing to move to cultural spaces reserved for their exclusive occupation, mainstream society is becoming more anxious about an 'imagined'

⁸⁰¹ Anne Phillips, *Multiculturalism without Culture* (Princeton, New Jersey: Princeton University Press, 2007), p 153-7.

⁸⁰² Evelyn Peters, "'Our City Indians': Negotiating Meaning of First Nations Urbanisation in Canada 1945-1975," *Historical Geography* 30(2002).

decompression of distance between themselves and the Other.⁸⁰³ Peters suggests that part of this can be attributed to the fact that the small minority of Aborigines living within the urban areas are becoming increasingly significant for other reasons. She notes that, in 1991, almost fifty percent of the Aboriginal population in Ottawa-Hull had some post-secondary education,⁸⁰⁴ thus, possibly further straining an employment market already saturated by too few jobs and too many over-qualified applicants. In many instances a limited job market and/or economic crises commonly gives rise to unsubstantiated finger-point (that are nonetheless powerful in terms of heightening social anxieties) that often has the effect of transforming the racialised Other into a scapegoat for the ills of society. These ideas are further reinforced by Peter's revelation that the employment rate amongst Aboriginal peoples in the areas of the country with a higher than average population of Aborigines is significantly higher (in some cases five times higher) than those areas with a lower number of Aborigines (she compares Toronto to Saskatoon).⁸⁰⁵ Anxieties of proximity do not seem to dissipate, but only increase as the concentration of native bodies in mainstream spaces rise. This could possibly explain the reasons why a larger percentage of the native population remains unemployed in those areas in which they are most concentrated. In these cases the Canadian State may need to evaluate and assess hiring procedures to ensure that Aboriginal applicants are not unfairly discriminated against by employers and perhaps incorporate processes whereby Aborigines are consulted as to their employment experiences and potential spaces for improvement.

Despite these somewhat gloomy reports, there have recently been some important transformations that appear to better incorporate native perspectives and address their experiences of economic and political inequality. In Canada and Australia the recognition of the Aboriginal community's history of oppression and marginalisation has given rise to some very interesting and innovative ways of incorporating Aboriginal voice into social and political institutions. For instance, legal education in both countries now integrates courses in Aboriginal law and custom.⁸⁰⁶ Similarly, there have been policies implemented that encourage Canadian employers and educational institutions to prioritise Aboriginal applicants in their hiring and

⁸⁰³ ———, "Geographies of Aboriginal People in Canada," *The Canadian Geographer/Le Géographe canadien* 45, no. 1 (2001): 140.

⁸⁰⁴ Ibid.: p 140.

⁸⁰⁵ Ibid.: p 141.

⁸⁰⁶ Michael Chesterman and David Weisbrot, "Legal Scholarship in Australia," *The Modern Law Review* 50, no. 6 (1987): p 718. The University of Toronto and Osgoode Law School offer Aboriginal law as an area of focus as part of their LLB Program. See, "Aboriginal Law," University of Toronto Faculty of Law, <<http://www.law.utoronto.ca/focus-area/aboriginal-law>> (Accessed Date: 15 December 2013). Also see, "Intensive Program in Aboriginal Land, Resources & Government," Osgoode Hall Law School, <<http://www.osgoode.yorku.ca/clinics-experiential/clinical-education/aboriginal-lands-resources-governments>> (Accessed Date: 15 December 2013).

acceptance procedures.⁸⁰⁷ While these processes present some interesting ways of recognising Aboriginal culture and history as an integral component of the contemporary political community, and promoting their economic flourishing, there is still much work to be done. For example, some authors suggest that academic institutions, being political institutions that exercise power through knowledge-control and dissemination, should adopt policies to enhance the cultural diversity of their faculty and ensure that minority cultures are better represented.⁸⁰⁸ Indeed the policies that are implemented to alleviate structural inequalities between native communities and mainstream society will need to depend on the specific contexts in which they are being implemented, and they must, to some degree, be implemented through consultation with the groups that are being affected.

My concern with the unequal economic and political position of the native arises from a desire to better enable the exercise of native agency. Through various (implicit and explicit) policies native mobility has been fundamentally limited which, I argue, affects her/his capacity for coeval recognition and engagement in self-reflexive intercultural dialogue. Liberal law's emancipatory potential is, therefore, limited by the native's inability to strongly resist and question the prevailing discursive and institutional structures (i.e. engage in the exercise of counter-power) which shape and influence everyday social realities of, and interactions between, native and mainstream societies. Insofar as liberal law fails to increase the discrepancy between our past experiences and future expectations, allowing prevailing power structures to operate unchallenged, it does a disservice to not only the native, but also to the rest of the political community by limiting the transformative potential of a number of political and social institutions that both constitute, and are themselves constituted by, Occidental Legality and its regulation and representation of space in ways that reproduce native alterity and work to further fragment the political community.

⁸⁰⁷ In Saskatchewan this has given rise to program of learning directed towards helping Aboriginal students seeking acceptance to law schools. See, "Program of Legal Studies for Native People," University of Saskatchewan, <<http://www.usask.ca/plsnp/>> (Accessed Date: 10 December 2013). For example, Canada's Department of Aboriginal Affairs and Northern Development has put in place a "fifty percent Aboriginal Hiring Policy". See, Aboriginal Affairs and Northern Development Canada, "Fifty Per Cent Aboriginal Hiring Policy," Government of Canada, <<http://www.aadnc-aandc.gc.ca/eng/1100100033841/1351175821088>> (Date Accessed: 01 December 2013). Moreover, the Canadian Human Rights Commission has specifically laid out an 'Aboriginal Employment Preferences Policy' for employers which obliges them to offer preferential treatment to Aboriginal applicants for positions where the primary purpose of the employer is to serve the needs of Aboriginal groups. See, Canadian Human Rights Commission, "Aboriginal Employment Preferences Policy," Government of Canada, <http://www.chrc-ccdp.ca/sites/default/files/aboriginalemploymentpreferencepolicy_0.pdf> (Accessed Date: 01 December 2013).

⁸⁰⁸ Duncan Kennedy, "A Cultural Pluralist Case for Affirmative Action in Legal Academia," *Duke Law Journal* 1990, no. 4 (1990).

7. Conclusion

In this chapter I discuss how liberal law can serve as a vehicle of emancipation for previously marginalised native communities. While much of this thesis has been devoted to discussing the regulatory aspects of colonial and later postcolonial law, I suggest that liberal law has the potential to address issues of native inequality and injustice. However, in its current form, liberal law's protection of cultural diversity is largely operationalised through the concept of legal recognition. In the early sections of this Chapter I critically assess the many ways in which legal recognition fails to adequately address the essential issues that underlie issue. Essentially, legal recognition produces a flimsy solution to the issue of minority rights, and fails to fully acknowledge the self-governing aspirations of Aboriginal peoples. In response to its two main deficiencies: its focus on cultural difference rather than hybridity and its emphasis of recognition struggles as one dimension of political struggle more broadly, I advance a new conceptual framework through which indigenous rights may be better articulated and protected. This is my theory of coeval recognition. Through this chapter I argue that coeval recognition can be operationalised through an acknowledgement of legal/cultural hybridity and the pursuit of intercultural self-reflexive dialogue. I further suggest that these two devices need to be supplemented by a focus on alleviating the structural inequalities that prevent the mobility of the native body.

As the processes of Occidental Legality have always been preoccupied with increasing the referential distance between the native and settler body, it is precisely this immobility that needs better addressing if contemporary societies are interested in creating more inclusive policies and institutions. These processes must be pursued with one's awareness of the radical alterity of the Other, while also recognising the Otherness that one represents to the native. In understanding that dialogue between the self and Other has the possibility of producing identities/cultures/legalities in-between, or hybrids, in being receptive to one's own miscegenation along with the miscegenation of the Other, political communities are better equipped to implement institutional designs that incorporate subaltern perspectives and experience and give rise to a 'living' liberal law that continues to operate as a positive and innovative vehicle of political and social change.

Conclusion

Counteracting the Processes of Occidental Legality

Coeval Recognition and Pluralism

1. Occidental Legality and the Production of a Territorial Vision of Space

This thesis set out to unravel how territory is the culmination of a number of smaller micro-level social processes connected with how we envision and experience our surrounding environment and the people within it. It emerges as a landscape to be observed and documented; an imagined plane of human interaction; and a spatial area to be owned and regulated. While territory is often presented as a static and neutral setting upon which history unfolds, this thesis reveals the partial and political nature of territory. There is a reciprocal relationship between the ways in which people observe and experience land, climate, and topography, and how they envisage their relationship to others sharing that same space. The natural features of our environment influence how we relate to others in a shared location. At the same time, how we imagine and depict our environment is informed by how we perceive the people that reside within it.

Consequently, a central argument that this thesis makes is that the concept of territory materialises out of struggles for political power. I use the term 'Occidental Legality' to refer to how these conflicts for power have become *spatialised*, grounded in land and geography. This thesis highlights how territory is an ordering of space that originates from the Imperial-Indigenous encounters of the early fifteenth century, and continues to be reproduced through the law of contemporary liberal societies. Indeed, when we think of 'territory', as a concept, we are immediately drawn to a conception of space that is bounded, owned, and culturally-divisible.

As space and distance were compressed – first through the advent of overseas technologies and later through the consolidation of nation-States – societies devised a number of cultural, political, and legal technologies to continuously reproduce this bounded, owned, and culturally divisible view of space. This conversion of space into 'place' helped to preserve the illusion of cultural homogeneity and reduced anxieties over 'black and white bodies touching one another'. Over the course of this thesis I examined at least a few of these technologies, which included cartography, ethnography, and the legal reinforcement of cultural geographies (i.e. the Reservation, the Tribal Areas). While we are given the impression that the territory of

contemporary liberal societies encompasses, even encourages, social pluralism, it is possible to identify many ways in which it disciplines, and often, sequesters cultural difference. For this reason I argue that territory is a powerful optic through which we can examine the politics of difference to expose the inconsistencies that underlie contemporary liberal responses to cultural pluralism. These responses, I argue, continue to demonstrate liberal societies' discomfort with the possibility of cultural and racial intermixing. The law that emerges to manage issues of diversity and regulate the relationship between cultural communities in liberal societies, is as uneasy about cultural (and by extension legal) hybridity as the forms of legal regulation that materialised during the first colonial encounters.

However, legal and cultural hybridity is a reality of the postcolonial condition that liberal societies *must* come to terms with if they are genuinely interested in preserving and encouraging social pluralism. One of the key preconditions of this recognition of hybridity is that societies unpack and address how the traditional conception of territory silences hybridity, how it gives us the impression that recognition of diversity requires that cultural communities be quarantined within their own, non-intersecting, spaces of existence. I examine two of these cultural spaces - the Aboriginal Reservations in Canada and Australia and the Tribal Areas of Pakistan - to reveal how they challenge liberal principles related to cultural diversity. Similarly, I also identify several discursive strategies by which societies 'neutralise' other spaces of their normative content to expand the referential distance between once-separated cultural communities. Specifically I discuss wilderness and biodiversity discourse as two examples of this.

Through each of these strategies a bounded, possessed, and culturally-divisible conception of space is reproduced. This territorial view of space re-establishes the distance that has been progressively diminished as once-divided cultural communities are forced to interact with one another. As such, territory materialises out of jurisdictional challenges. It is the artefact of normative conflict between minority communities who long for self-rule, and the dominant political elite who wish to maintain the totality of their power within the political and legal dimensions of social life. These conflicts express themselves as struggles for recognition. The concept of territory, therefore, represents the specific terms according to which these struggles for recognition are legitimated, and while they appear neutral towards (sometimes even empowering) minority interests, they are terms that are stacked heavily in favour of the modern nation-State.

Consequently, I develop the argument that contemporary liberal societies need to attend to the divisive effects of territory in order to properly address the demands of indigenous peoples.

These demands are not merely for property rights in land. To interpret and administer indigenous demands for self-rule as demands for territorial autonomy is to *misrecognise* indigenous peoples. I spend the last section of Chapter Three discussing what indigenous demands for recognition entails. Specifically, it requires recognition of their inherent right to sovereignty; a right that the Aboriginal people argue was initially recognised at the time Aboriginal land was transferred to the British Crown. Chapter Three clarifies some of the ways Aboriginal peoples believe that the State can better recognise their sovereignty, and I explain how territory forecloses this possibility by framing the terms of this recognition so as to delegitimise the claims of Aboriginal people. The argument that I make is that territory prevents coeval recognition between the State and Aboriginal peoples. In particular, I highlight how it preserves the perception of cultural difference and political and legal incommensurability between the two and, as such, conceals from us the many ways in which the dominant and minority cultures intersect, intercommunicate, and mutually-influence one another.

While I spend the first three chapters critiquing how the law of liberal societies fails to properly recognise and address the demands of its native communities, my objective is not to replace liberal law with native institutions and forms of regulation. I specifically address why this is the case in Chapter Four, where I show how the spatialisation of native law – in the form of Pakhtun territorial autonomy in Pakistan – has also failed to produce acceptable political, legal, and social conditions for the management of ethnocultural diversity. Consequently, Chapters Two, Three, and Four build towards my overarching argument that minority recognition in liberal societies must take the form of coeval recognition, a form of recognition that acknowledges the active simultaneity of State and native histories and relations. Coeval recognition is premised on accepting and celebrating the presence of cultural and legal hybridity. To this end, Chapter Five contextualises and more seriously expounds the theory of coeval recognition. I end Chapter Five by introducing some ways in which contemporary liberal societies can overcome the divisive tendencies of territory by acknowledging the descriptive and normative value of hybridity. I identify two processes which collectively nudge contemporary societies towards coeval recognition: self-reflexive intercultural dialogue and the implementation of political and economic policies which have the effect of mobilising the native body in space.

An acknowledgment of hybridity informs *self-reflexive intercultural dialogue*. This process recognises that the minority and dominant communities simultaneously occupy the same time and space, and that both have the capacity to radically restructure their ways of thinking and being (i.e. capacity for hybridity). *Self-reflexive intercultural dialogue* can stimulate dialogue and negotiation that transcends the cultural boundaries that convey cultural incommensurability and that have become entrenched through the processes of Occidental Legality. Third, I

highlight the need for accepting the *plasticity of the body*,⁸⁰⁹ which enables coeval recognition in contemporary societies by providing a better technique for acknowledging the potential of complex human agency and multiple subjectivities.

One of the most important ways in which societies can actualise this recognition is by positively implementing policies and processes that allow the movement of the once immobilised native body. This, in turn, requires taking specific measures that allow for the option of movement out of designated 'native spaces' (i.e. the Reservation and the Tribal Areas), and the possibility of migrating between spaces. In Canada and Australia this would mean (among other things) upholding the treaty rights of off-Reserve Aborigines. In Pakistan this would mean better access to basic social and political institutions (i.e. education, the right to vote, healthcare). In both contexts of Australia and Canada, which are settler societies now liberal democracies, and Pakistan which is a colonised country now an independent nation-State, *plasticity of the body* would also mean negotiating ways in which liberal law can incorporate disempowered voices and normative frameworks. For example, I discuss the possibility of opening up liberal law to unofficial or informal forums for dialogue, which can include tribal courts and religious tribunals, but also informal sources of normative authority (i.e. cultural texts and non-European literary narratives). This last suggestion is particularly important because I have argued that the spatio-legal discourse of territory continues to reproduce and entrench European cultural and literary narratives. According to which European institutions and ideologies have greater political significance and legal value than their indigenous counterparts.

2. Unsettling the Foundations of Territory

This thesis develops a more comprehensive narrative of territory by challenging assumptions of stable (and neutral) and coherent structuring of space and social ordering, and linking them to images, narratives, and accounts that were sometimes incoherent,⁸¹⁰ and sometimes fantastical.⁸¹¹ I demonstrate how these imagined geographies represented social and political life in ways that tended to distort reality.⁸¹² I introduce an approach that highlights how territory is produced through an imaginary authenticated by structures of political and legal

⁸⁰⁹ See my discussion of Bhandar's work in Chapter Five, p 228-9.

⁸¹⁰ See my discussion of tropicity discourse, which often defined spaces that were not located in the 'tropics' as having the climate and topography of the tropics, so as to create an imagined geography of pestilence and contamination. *See*, p 93.

⁸¹¹ See my discussion of the narratives and mappings of the (non-existent) Kong Mountains and India Tertia, in which foreign places were made mystical through stories relaying the presence of 'dragons' and incredible riches. *See*, p 85.

⁸¹² See my discussion of the aesthetics of mapping, which portrayed native/settler relations in a positive light, relaying European benevolence and native invitation. *See*, p 94. Also see my discussion of narratives of pristine wilderness which had the effect of emptying foreign spaces of their normative contents, and relaying it as unoccupied (i.e. *terra nullius*).

governance. This imaginary, I argue, is focused on maintaining not only social difference, but *distance* between communities that find themselves to be suddenly located very near to each other during the colonial period in the past and under conditions of diversity in the present. More importantly, a focus on this relationship allows me to examine and clarify how this preoccupation and anxiety with proximity between the self and Other continues to influence many of the political and legal geographies that emerge through societies' attempts to manage social pluralism even today. Thus, I problematize the claims of liberal society that it welcomes authentic cultural diversity, respect and recognition, and seeks a more 'inclusive' regulation of social diversity.

3. Broader Debates of Human Geography

A. Imagined Geographies and Discursive Power

The methodological approaches used in this thesis draw on human geography. I also use literary analysis to study the spatial history of a legal concept (i.e. territory). These approaches suggest a mutually constitutive relationship between law and *imagined* geographies. This method draws heavily from Said's work in *Orientalism* and the imagined geographies of the Orient and Occident, as well as Haldar's approach which examines how European perceptions of Eastern excess were encoded in Western conceptions of legal subjectivity.⁸¹³

While there is notable literature that develops the idea that law shapes human relationships by controlling access to geographic space.⁸¹⁴ Much of this work studies the contemporary political and legal manifestations of territory. There is another set of literature that looks at the history of political geography, with authors like Agnew focusing on the geographic distributions of power and how changing political and social situations transform these distributions.⁸¹⁵ Some authors also study the geographic distribution of colonial power, examining how non-European spaces were settled and regulated as part of the colonial project.⁸¹⁶ Yet both of these bodies of work emphasise the political and legal structuring of the natural environment to shape human behaviour and political action (through both texts and practice), and neglect how the making of space is as much an imaginary and discursive process, that relies on fantasising the very relationships and identities, even the environments, that the spatialities being produced are

⁸¹³ P. Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (London: Routledge Cavendish, 2007).

⁸¹⁴ Sack idea of 'territoriality'. See, Robert D. Sack, "Human Territoriality: A Theory," *Annals of the Association of American Geographers* 73, no. 1 (1983): p 5-6. Also see, David Storey, *Territories: The Claiming of Space* (New York: Routledge, 2012).

⁸¹⁵ John Agnew, *Making Political Geography* (New York: Arnold Publishers, 2002).

⁸¹⁶ Tracy Banivanua Mar and Penelope Edmonds, eds., *Making Settler Colonial Space: Perspectives on Race, Place, and Identity* (New York: Palgrave Macmillan, 2010).-

meant to control. Essentially, these studies are consistent with the traditional separation within human geography literature between material processes and relations of space-making on the one hand, and the discursive processes of producing, communicating and making sense of these processes on the other.⁸¹⁷

This 'imagined' element of space-making has found some resonance in the work of Benedict Anderson,⁸¹⁸ Sherene Razack,⁸¹⁹ and Tuan,⁸²⁰ all of whom discuss how spaces have meaning for people based on their (racialised, gendered, nationalised) histories, through the use of legal categories and imagined emotional connections. Yet, these authors appear to accept the 'naturalness' of our environment as a setting that simply 'lies there', and which we saturate with meaning (through nationality discourse, through law, through emotional and human attachments). This same literature also discusses subaltern imagined geographies, how disempowered groups recreate their space as 'places' of comfort. While this last body of literature certainly moves closer to the key themes of this thesis it fails to question hegemonic spatialities, like territory, in ways that move outside the traditional 'truth' discourses of law and politics.

Indeed legal and political processes are powerful, in the sense that they often work as discourses of authentication. Stories, narratives, histories, are verified and validated through their incorporation into, and circulation through, in particular, law. Law is perceived as an objective, neutral, and universal discourse of *truth*. Consequently, through the methods employed in this thesis I cast into doubt law's production of categories such as territory and culture by drawing a strong connection between law and subjective experience. Thus, this thesis simultaneously unsettles conventional perceptions of both legal regulation and spatial organisation, by revealing how they are both intimately related with one another, but also how they are connected to the land as well as communications of subjective human experiences.

B. Timeless Geographies, Progressive Geographies & Hybrid Geographies

This thesis also contributes to and challenges debates which inform social science's interest in the 'spatial turn'. In particular, it adds to literature in socio-spatial studies which argues that, for too long, we have focused on the idea of time and neglected the significance of space.⁸²¹ While

⁸¹⁷ Sarah Whatmore, "Hybrid Geographies: Rethinking the 'Human' in Human Geography," in *Human Geography Today*, ed. Doreen Massey, John Allen, and Philip Sarre (Cambridge: Polity Press, 1999), p 23-4.

⁸¹⁸ Benedict Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*, Rev. ed. (London: Verso, 2006).

⁸¹⁹ Sherene Razack, ed. *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002).

⁸²⁰ Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis: Minnesota University Press, 1977).

⁸²¹ Michel Foucault and Jay Miskowiec, "Of Other Spaces," *Diatrics* 16, no. 1 (1986): p 22. *Also see*, Edward W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989), p 14.

this is certainly true, in the sense that history has been the predominant category of analysis in the social sciences, this thesis exposes both time and space as aspects of one another by producing a 'historical geography'.⁸²² It does this by revealing how spaces are historicised (i.e. temporalised), and how time, in turn, has the potential to be *spaced*.⁸²³ Moreover, the persistence of a territorial model of space – space as owned, possessed, and culturally-divisible – from the fifteenth century until today, proposes the possibility that geographies can be fixed, and rendered outside the paradigm of time by the continued processes of Occidental Legality. The analysis of Aboriginal title jurisprudence relays time as *relational*, as open to reformulation *through* space. This was demonstrated by how the Aboriginal tradition was determined by reference to the bodily presence of Aboriginal people in the same space as Europeans, but *also* before Europeans. Their presence in the claimed areas had to be continuous from time *immemorial* in order to justify colonial rule and its concomitant political and legal authority over native non-European subjects.

Revealing the complex inter-weavings of space and time raises some interesting questions, and opens up the conversation to those who argue that the nation-State or the territorial space of the State represents a progressive geography.⁸²⁴ To imagine the territory of the State as categorically progressive essentialises its many spaces, and assimilates all these numerous mappings of space-time (the Reservation, the Aboriginal title, the Tribal Areas) to, what Motha has referred to as a single and unitary 'sovereign event'.⁸²⁵ As such, these space-times, at once, become progressive yet stagnant, visible yet concealed through processes of Occidental Legality that present these spheres of power as 'neutral'. In assimilating these spaces to the 'progressive' realm of the State, these processes cast doubt on the emancipatory potential of legal and political geographies like the Reservation by repudiating the presence of multiple sovereignties. This is problematic because, as Motha claims, it is essentially what legal recognition of Aboriginal title is meant to convey.⁸²⁶

By pointing to the imaginative geography of territory, and by referring to the numerous time-spaces which have been modelled on its vision of geographic space (i.e. the Reservation, Tribal Areas), I cast doubt on geographic categories that have previously been perceived as stable,

⁸²² Michel Foucault and Jay Miskowiec, "Of Other Spaces," *Diatrics* 16, no. 1 (1986).

⁸²³ See my discussion about the North-West Frontier as a space that was, essentially, in-between time and space (i.e. the settled areas were defined as more modern, or modernisable, than the unsettled areas, and the Frontier's designation as a buffer zone essentially constructed it as a non-place between the two spaces of Russian Afghanistan and British India). See, p 202.

⁸²⁴ As can be seen by Ratzel's use of Darwinist understanding of the State as an 'organic' and continually developing geography. See, Friedrich Ratzel, "The Territorial Growth of States," *Scottish Geographical Magazine* 12, no. 7 (1896).

⁸²⁵ Stewart Motha, "The Sovereign Event in a Nation's Law," *Law and Critique* 13, no. 3 (2002).

⁸²⁶ *Ibid.*

neutral, and passive. For example, I discuss how climate and tropicality, while assumed to be naturalised, coherent and consistent classifications of the natural environment, produce feelings of marvel when applied to certain spaces at certain times, but also of fear and anxiety in other contexts and situations.⁸²⁷

Similarly, in my discussion of the pristine wilderness I reveal how designations of wilderness led to processes for protecting the environment on the one hand (i.e. parkland), while at the same time causing political agents to determine that the space had not been sufficiently developed (and thus open to European occupation and possession) on the other. This analysis reveals geographic space as both fluid and active, being produced in different forms at different times. In some cases, as Whatmore discusses, this draws attention to the idea of hybrid geographies. "The hybrid geographical literature" she claims "is concerned with studying the *living* rather than abstract spaces of social life, configured by numerous, interconnected agents – variously composed biological, mechanical and habitual-properties and collective capacities – within which people are differently and plurally articulated."⁸²⁸ The discourse of geographic hybridity further opens up the possibility for dialogue and negotiation between differently situated communities and leaves the future open to less oppressive reconfigurations of space. Geography, in this instance, emerges as a site for politics. Geographic hybridity, therefore provides an interesting possibility to consider when drawing connections between the many time-spaces mapped onto the territory of the State.

C. Disembodied Identities and Native Subjectivity

The methods of law and geography reveal the ways in which territory is both a measure of power as well as an artefact of power. It is a measure of power because of the political, economic, social, and cultural processes that it enables (or regulates). For example, in the case of Aboriginal title jurisprudence, the ability to demonstrate a cultural identity that reproduces an owned, bounded, and culturally-divisible vision of space, effectively confirms the Aboriginal claimant's legal subjectivity and rights to land (and here I draw attention to the wealth of resources that land makes available) and self-government. Territory is a discourse of power. Yet, the thesis demonstrates that territory is also the product of various subjective exercises of witnessing – including map-making, travel accounts, and letter-writing. Consequently, it is possible to argue that these exercises of witnessing are also exercises of power because they are able to recreate (or represent) the observed objects in ways that are suited to the interests of the observer.

⁸²⁷ See p 93.

⁸²⁸ Sarah Whatmore, "Hybrid Geographies: Rethinking the 'Human' in Human Geography," in *Human Geography Today*, ed. Doreen Massey, John Allen, and Philip Sarre (Cambridge: Polity Press, 1999), p 25-6.

These are examples of exercises of power that are related territory because the document what is being observed and thus, in some way, recreate (or represent) the observed objects in ways that are most suitable to the interests of the observer. The chronicling of an event, the reporting of a personality or practice, are not objective observations, but, as I argue in Chapter Two, often involve making moral judgments about what is being 'witnessed'. Accordingly, these witnessing narratives *produce* the object or entity being observed, and the capacity for that production empowers the observer to make and convey judgments about what is being represented.

To think that discursive power operates in the subconscious, in the sense that we are not aware of its productive and creative capacity, is to neglect the extent to which the urge to represent has been a deliberate and calculated political policy. I reveal this in my analysis of Lord Curzon and Hastings' policies in ruling India.⁸²⁹ Both political administrators were keen to rule India and the North-West Frontier through a policy of cultural appropriation. This involved learning the traditional practices and language of their Indian and Pakhtun subjects, and then using this knowledge to shape colonial-native relations. They believed that, by appropriating these aspects of native culture they would be able to eliminate forms of indirect/proxy rule, and foster more amenable relations with the native on the basis of a 'shared culture'.

This brings us back to the idea of disembodied identities and a denial of the significance of corporeal emplacement and experience. As I argue in Chapter Three, this form of rule through 'cultural knowledge' is essentialistic and fails to accept the significance of native agency. It also forces us to consider how native culture can be embodied by someone who does not share the native's corporeal experiences. This suggests that native identities are static and impermeable to active exercises of agency. Moreover it also conveys the idea that the settler (and later the State) is both equipped and authorised to speak for the native and define his culture.

The problems associated with this assumption of being able to speak on behalf of the native are numerous. Here I refer back to my reading of Merleau-Ponty in Chapter One, where I consider the issue of corporeal emplacement and how the act of perception (or observation) imposes spatial and temporal restraints on the object being observed. The observer automatically presupposes the object as having been 'discovered', as not existing before the act of observation (at least for him and everyone else that has never seen the object but who he will tell about seeing the object).⁸³⁰ Thus, Curzon's and Hastings' acts of 'witnessing' native culture, and the act of 'defining' (by adopting what is believed to be part of native culture), ultimately reproduces

⁸²⁹ This is also revealed as a strong policy choice that Caroe adopted while he was Governor of the North-West Frontier Province. See, Olaf Caroe, *The Pathans, 550 Bc--Ad 1957* (London: Macmillan and Company Limited, 1958).

⁸³⁰ See, p 46.

that culture through the perception of the observer. What is ultimately produced is no longer 'Indian culture', but something 'in-between'.

This claim is significant precisely because we can identify a similar thread of reasoning within contemporary law in relation to Aboriginal title jurisprudence. The law and its institutions (i.e. courts) rely on the idea of 'discovery', demonstrated by the colonial agent and conveyed through mapping and letter-writing. This is the idea that supports the State's underlying claim to sovereignty (i.e. the idea of 'discovery'). Second, the law also appropriates native culture, and it does this by telling the native how he must articulate his identity in order to be considered a legal subject (i.e. demonstrating a temporally and spatially fixed cultural identity). Third, the law reproduces the native through its own 'culture', demonstrated by the fact that the native now understands his own subjective, identity, and culture *through* the law (i.e. the native accepts that he has certain claims to his land and behaves in ways consistent with that claim). This analysis is interesting because it suggests that, while the native appears to become successively more *empowered*, meaning that he is progressively given greater voice to articulate his identity, the processes for doing so become further regulated and so the articulation of his identity through the law has the effect of misrepresenting him. This was, for example, revealed in my analysis of *Delgamuukw* in Chapter Three, in which the State's claims of sovereignty and absolute political authority meant that it could not recognise the claimants as 'nations' (which is how they saw themselves). This also demonstrates how the processes of Occidental Legality become more invisible to us in the very moment that an owned, bounded, and culturally-divisible view of space is adopted and mobilised by the very groups that it is meant to control and contain.

D. Law as a Cultural Process

This thesis also develops inter-connections between the legal, the social, the temporal, and their involvement in the production of geography. As social processes – debated broadly through the vernacular of human geography – these aspects of space cannot be studied in isolation from one another, or as sub-fields that have 'an effect' on geography. Drawing on Delaney and Blomley's discussion of the splicing and braiding of law and geography,⁸³¹ I suggest that the study of geographic space and, in particular, of the history territory, reveals to us the strong interconnections between law and culture. This revelation unsettles the conventional positivist view of law as a neutral and universal system of rules. Law is not a distinct social and cultural entity. Instead, it is informed by a number of different social and cultural processes and

⁸³¹ David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making* (Abingdon, Oxon: Routledge, 2010), p 23. Also see, Nicholas Blomley, *Making Space for Law*, ed. Murray Low, Kevin R. Cox, and Jennifer Robinson, *The Sage Handbook of Political Geography* (London: Sage, 2008).

discourses. I reveal a number of these through my idea of Occidental Legality and law's production, or rather *reproduction*,⁸³² of space as territory. Yet, that does not mean that law can simply be reduced to an inevitable tool of those with power and in positions of authority. To accept this reductionist vision of law as equivalent to Occidental Legality is to deny law's potential as a vehicle for emancipation for minority communities.

Accordingly, if law is thought to be informed by culture, then the emancipatory potential of law is maximised when multiple voices and perspectives are allowed to inform the category of 'culture'. One of the ways in which I argue that contemporary societies can open up liberal law is by intercultural self-reflexive dialogue, by ensuring that the law is open to being shaped by numerous perspectives engaging with one another. An important step in this process is to shift away from compartmentalising cultures through space (i.e. spatially and temporally distancing social groups from one another) and thus preventing the possibility for opposition, dialogue, and conflict. I further develop this idea of dialogue through the idea of self-reflexivity because the parties to the dialogue must be open to a radical reshaping of their own cultural perspectives and worldviews by other participating cultural communities. This, I argue, creates the conditions (or protects the conditions) for legal, social, and cultural hybridity.

4. Prospects for Further Research

This thesis has developed a historical narrative of territory, as a space that is owned, possessed, and culturally-divisible and explored its significance for law and the regulation of minorities in liberal democracies. While the primary objective of this thesis was to draw attention to how geographic space (and its inhabitants) are structured and ordered by the correlative relationship between law and the social imaginary, I have also developed ideas for how contemporary societies can move forward to identify, address, and overcome the oppressive exclusionary effects of Occidental Legality.

One promising idea is that of developing legal and political processes for coeval recognition which accept the reality of hybridity. This, in turn, also requires embracing intercultural self-reflexive dialogue, and conscious policy-making that reduces the economic, political and social inequalities between native and mainstream societies. My focus on coeval recognition has evolved from Bhandar's work on the implausibility of mutual recognition within a postcolonial setting in which the native is largely constructed through the signs, symbols, and language of a

⁸³² In the sense that it is produced through the social imaginary and authenticated and circulated through law.

colonial (racialising) discourse.⁸³³ I discuss crucial modifications and suggest some possible avenues that can go beyond mere recognition towards a more authentic 'coeval recognition'. A more robust framework for the protection and recognition of diversity requires a more thorough, and contextual, analysis of how these ideas can be put into practice within contemporary societies. Indeed the political, social, and legal contexts informing different societies will have an effect on how coeval recognition is pursued. Nonetheless, it is important to this process that minority communities are consulted and included in the decision-making processes. One of the problems that must be addressed by contemporary societies is how to bring in the perspectives of more vulnerable members of minority communities (i.e. women, children, sexual minorities, etc). Thus, what may be of value to consider would securing conditions of dialogue by, also, collaborating with human rights and non-governmental organisations, who may be in a better position to represent minorities and be better equipped to assist with their participation in the process.

In relation to hybrid geographies, future research in the area of Aboriginal Reservations and tribal spaces can draw attention to how spaces are active constructions that do not simply 'lie there', but are effectively produced and reproduced through social interaction.⁸³⁴ What may be crucial to new exploratory projects is a reflection on how activity and network-building between the inhabitants of Reserve-space and the State-space (and I use those terms loosely and for the sake of clarity more than as absolute categories) can further maximise the emancipatory potential of liberal law, and also the emancipatory potential of the political and legal geographies that are created through it. This, as I suggested in Chapter Five, locates the exercise of power on the individual(s) and their productive and creative space-making capacities.

Perhaps one of the more contentious aspects of this thesis has been its claim that territory and notions of autonomy grounded in spatial differentiation further perpetuate the effects of Occidental Legality. For many multiculturalists this may be an alarming claim given that, at first glance, it appears to veer away from the idea of territorial self-government. However, as I discussed in Chapter Five, the intent is not to reject forms of territorial autonomy, if that is precisely what autonomy-seeking groups want. My concern is that a focus on territorial solutions conceals what lies at the heart of these demands, the appeal for coeval recognition. What is necessary, however, if societies are interested in maintaining territorial autonomy as potential solutions for recognising diversity, is that they consult with minority groups to develop robust policies which make the option for exit or the potential for greater hybridity (i.e.

⁸³³ See my discussion in Chapter Five, p 229.

⁸³⁴ This may go back to my earlier discussion in Chapter One about spaces as performances. *See*, p 56.

identities that bridge the spatial divide between mainstream spaces and native spaces) realisable. I discuss some of these policies in Chapter Five, but certainly there can be many more ways in which societies develop this idea further. One of these is a focus on language rights, which is something I consider in Chapter Four and my case study of Pakistan.

Researchers interested in the intersection between law and imagined geographies may also usefully employ a historical literary analysis of subaltern geographies. A focus on constructions of space through Aboriginal cosmologies, or tribal conceptions of space and place may present interesting ideas of how to construct more inclusive hybrid geographies. Furthermore, this study can help inform the conventional ideas about 'traditional' worldviews and the persistence of underdeveloped geographies. Further research may be necessary to reveal whether these may or may not be misconceptions. Certainly there are studies that claim that, according to some Aboriginal cosmologies, the human being is imagined as an extension of the natural environment, and thus forms of industrial development sit at odds with this sacred view of space.⁸³⁵ Yet, at first glance, much of this literature appears to essentialise native cosmology and holding these worldviews as 'fixed' representations of native identity and their relationship with geography.⁸³⁶ So in some way a historical analysis of these views of space and geography may be able to inform our understanding of how Aboriginal law operates today.

I end this thesis by re-stating the quote which I used at the start of this thesis:

i]f myth and fantasy touch on levels outside the conscious mind, then simply to point out the falsity of one's imagination leaves untouched the psychic investments which determine the formation of the fiction that sustains the world we live and act within. To recognise the instability of the divide between fantasy and reality, fiction and facts is to begin the difficult and painful task of constructing alternative futures.⁸³⁷

This thesis has uncovered the ways in which territory is, as it stands, a disempowering discourse for minority communities. It is also an imagined geography that emerges through the blending of fact and fiction, subjective experience and objective knowledge. Nonetheless, how to 'undo' territory is not the only or main question we should be asking. It is debatable whether such an expectation is even reasonable, given the State-centred orientation of global politics. By

⁸³⁵ Nurit Bird-David, ed. *Tribal Metaphorisation of Human-Nature Relatedness: A Comparative Analysis*, Environmentalism: The View from Anthropology (London: Routledge, 1993).

⁸³⁶ For example, Elkin's title on a study of Aboriginal cosmologies and identities is simply 'Elements of Australian Aboriginal Philosophies', which appears to minimise the fact that the Australian Aboriginal community has persisted for over 50,000 years and speaks 200-300 different dialects. And thus, it is appears highly unlikely that, in response to these facts you could have an article that considers 'Australian Aboriginal' philosophies in totality. See, Adolphus Peter Elkin, "Elements of Australian Aboriginal Philosophy," *Oceania* 40, no. 2 (1969).

⁸³⁷ Gail Ching-Liang Low, *White Skins/Black Masks: Representation and Colonialism* (London: Routledge, 2004), p 2.

relating these methods to the problems of Indigenous rights and cultural diversity I introduce a more 'spatially-aware' discourse of pluralism. Through this discourse we are able to recognise how the law has worked to conceal the hybridity of people-in-contact with one another by fixing and locating things *in space* and *through space*. I also explore how 'imagined geographies' and space have been used to conceal the hybridity of law through processes of territorialisation. While the processes of Occidental Legality continue to shape the everyday social interactions of contemporary society, this thesis has suggested some important ways in which its most oppressive tendencies can be addressed, challenged and, perhaps, counteracted.

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